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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

RICHARD RUNYAN
Petitioner

vs.

NCR CORPORATION
Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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128 pp

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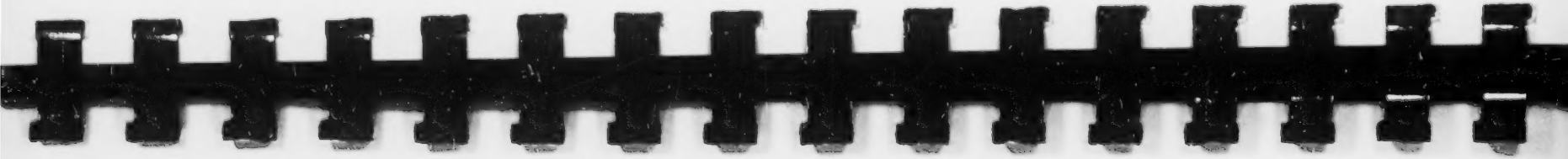
QUESTIONS PRESENTED

1. Does the Fair Labor Standards Act (FLSA) case law, as incorporated in the Age Discrimination Employment Act (ADEA), bar private, unsupervised releases of ADEA rights?

2. Can ADEA claims be waived by a general release that fails to expressly mention ADEA rights?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner: Richard Runyan (hereinafter referred to as "Petitioner"); and Respondent: NCR Corporation (hereinafter referred to as "Respondent").



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SUPREME COURT of the UNITED STATES

October Term, 1985

No. _____

RICHARD RUNYAN, Petitioner

vs.

N.C.R. CORPORATION, Respondent

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

To the Honorable Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant a writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court which affirmed an order of the United States District Court, Southern District of Ohio, Western Division, sustaining the Respondent's motion for summary judgment. In its behalf, Petitioner shows unto this Court:

OPINIONS BELOW

The order and opinion of the United States Court of Appeals for the Sixth Circuit, en banc, filed April 7, 1986, is attached hereto as Appendix A. The order and opinion of the United States Court of Appeals for the Sixth Circuit, filed April 22, 1985, is attached hereto as Appendix B. The order and opinion of the United States District Court for the Southern District of Ohio, Western Division filed October 31, 1983 is attached hereto as Appendix C.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The decision sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit en banc, dated April 7, 1986.

The statutory provision believed to confer jurisdiction on this Court to review the judgment below by writ of certiorari is Section 1254 of Title 28 U.S.C.A., which provides that cases in the United States Court of Appeals may be reviewed by the Supreme Court by writ of certiorari.

STATEMENT OF THE CASE

This was an action for violation of the Age Discrimination in Employment Act (A.D.E.A.). Petitioner Richard Runyan worked in the legal department of Respondent NCR Corporation. He was discharged at age 59. Petitioner contends that age was a determining factor in NCR's decision to terminate him.

Subsequent to notification of his termination, Runyan entered into a year long consulting relationship with NCR, for which he was paid a monthly income. Later in 1977 NCR agreed to increase his income by $12,000 only if Runyan signed a general release. Petitioner signed the release because he had no prospects for employment and because he sorely needed the money to meet his financial obligations.

After searching in vain for a job, Petitioner realized the full extent of his damages. He then filed an ADEA lawsuit claiming $400,000 in damages.

NCR argued that the general, non-specific release signed by Runyan operated as a waiver of his ADEA rights. Judge Rice of the Southern District of Ohio, Western Division, agreed and dismissed the lawsuit. Runyan v. N.C.R., 573 F.Supp. 1454 (S.D. Ohio 1983).

Runyan appealed. His principal argument was that the ADEA must be interpreted to incorporate the Fair Labor Standards Act (F.L.S.A.) requirement that an unsupervised waiver of statutory rights is not a bar to a private suit.

The Sixth Circuit Court of Appeals agreed, reversed the district court and remanded the Runyan case for trial. Runyan v. NCR, 759 F.2d 1253 (6th Cir.

1985). The court analyzed the FLSA cases and the legislative history and concluded:

> "Congress when incorporating the FLSA enforcement provisions and specifically Section 216 is charged with knowledge of the Supreme Court's interpretation in O'Neil and Gangi that claims for wages and liquidated damages cannot be waived by executing an unsupervised release. . .we conclude that the O'Neil and Gangi line of cases, is applicable to the ADEA, as well."

NCR filed a petition for rehearing en banc which was granted. The Sixth Circuit Court of Appeals, en banc, affirmed the District Court, Richard Runyan v. National Cash Register Corp., _____ F.2d _____ (6th Cir. 1986). Relying on language in Schulte, Inc. v. Gangi, 328 U.S. 108 (1946) referring to, "the possibility of compromise in other situations which might arise, such as a dispute over the number of hours worked or the regular rate of employment" (Id. at 114-15) the court majority enunciated a new rule of

law: legal disputes may not be compromised under the FLSA or ADEA, but factual disputes may be compromised under both; "Accordingly we hold that an unsupervised release of a claim in a bona fide factual dispute of this type under these circumstances is not invalid."

HOW FEDERAL QUESTIONS WERE RAISED

Federal questions herein were raised in the briefs in the United States Court of Appeals for the Sixth Circuit.

ARGUMENT: REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. THE COURT DISREGARDED THE INTENT OF CONGRESS AND FORTY YEARS OF SUPREME COURT AUTHORITY IN HOLDING THAT ADEA RIGHTS MAY BE WAIVED BY A PRIVATE UNSUPERVISED RELEASE.

The issue is whether an unsupervised release is a bar to a subsequent suit brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et. seq. (ADEA).

In enacting the ADEA, Congress selectively incorporated the enforcement provisions of the FLSA (29 U.S.C. § 626 (b)). In Lorillard vs. Pons,[1] 434 U.S. 575 (1978) the Supreme Court held that judicial decisions interpreting procedural and enforcement portions of the FLSA are also incorporated into the ADEA:

> "In enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those

---

[1] Lorillard considered whether there is a right to a jury trial in ADEA actions.

> provisions regarded as undesirable or inappropriate for incorporation. . ."
>
> "Long before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions pursuant to the FLSA. Indeed, every court to consider the issue had so held. Congress is presumed to be aware of an administrative or judicial interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute. . ."

at 580-81 (citations and footnotes omitted)

In a similar vein, neither the FLSA nor the ADEA address the issue of whether an employee may privately waive his statutory rights. However, under the F.L.S.A., the Supreme Court has consistently held over the past forty years that claims for unpaid minimum wages or unpaid overtime compensation may not be released by employees, without approval of the Department of Labor.[2]

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[2] Brooklyn Savings vs. O'Neil, 342 U.S. 697 (1945); D.A. Schulte, Inc. vs. Gangi, 328 U.S. 708 (1956); Barrentine vs. Arkansas-Best

Based upon their own policy considerations, the Sixth Circuit chose to disregard Supreme Court authority and enunciated a novel rule, that an unsupervised release of a claim in a bona fide factual dispute is not invalid.

The view that there should be a dichotomy of treatment based on whether or not there is a disputed issue of fact or law has not been adopted nor even suggested by any of the Supreme Court decisions.

Brooklyn Savings, addressed whether, "...in the absence of a bona fide dispute between the parties as to liability, respondent's written waiver of his right to liquidated damages under § 16(b) bars a subsequent action to recover liquidated damages..." The Court held that, "it does not bar such a claim..." (emphasis ours).

Freight Systems, Inc., 450 U.S. 728 (1981); Tony and Susan Alamo Foundation vs. Secretary of Labor, 105 S.Ct. 1953 (1985).

In Schulte vs. Gangi, the Supreme Court explicitly addressed the question left open in Brooklyn Savings and held that a private, unsupervised release was invalid when there was a bona fide dispute as to liability, concerning coverage. The most recent Supreme Court decisions appear to hold that no private, unsupervised releases of any kind are valid under the FLSA. In Barrantine[3] the Court held:

> "This Court's decisions interpreting the FLSA have frequently emphasized the non-waivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act.
>
> Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived..."

Accord: Tony & Susan Alamo Foundation et. al., vs. Secretary of Labor, 105 S.Ct. 1953 (1985)

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[3] Barrantine considered whether FLSA rights may be waived through a collective-bargaining agreement. Barrantine vs. Arkansas-Best Freight Systems, Inc., 450 U.S. 728 (1981).

In the instant case there is a bona fide dispute as to liability. Respondent vigorously denies that Petitioner was terminated because of his age. Thus under the authority of Brooklyn Savings, Gangi, Barrentine and Alamo Foundation, the waiver herein is no bar to a private suit.

The Sixth Circuit based its holding on a footnote in the Gangi opinion which cited Strand vs. Garden Valley Telephone Co., 51 F.Supp. 898 (D.C. Minn. 1943).[4] Strand

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[4] The Strand case also held that rights under the FLSA may not be bargained away:

> "An employee under the Fair Labor Standards Act of 1938 may not bargain away such rights as are given by the Act. The right to damages for failure on the part of the employer to pay an employee the minimum wage is mandatory and does not become a matter of discretion for the courts, nor a matter of agreement between the parties To hold otherwise would be an abortion of the intent of Congress, defeat in part the purposes for which the Act was passed, and open the way to injustice, if not fraud. . .

at 904.

contained the following dicta:

> "I think this Defendant might have been able to settle or compromise such honest dispute. . . The facts with reference to such compromise or settlement must, however, be clear-cut and definite. There must be a final meeting of the minds upon the compromise, with a full understanding of the dispute and the effect of the compromise. The settlement must be as to the number of hours worked and thereafter must flow the full benefits as provided for by the Act, based on such hours. Such is not the situation here. . . (emphasis ours)

at 905.

Based upon this language the Sixth Circuit ignored the holdings of the Supreme Court and fashioned its own rule that disputes concerning "factual" issues may be compromised.

Assuming, arguendo, that the Gangi Court's footnote evidenced an intent to create an exception to the no-waiver rule, the exception implied by the Supreme Court and the Strand case is quite different from the one fashioned by the Sixth Circuit.

Brooklyn Savings enunciated two controversies involved in every FLSA case, "the existence of liability under the Act or the amount of such liability," i.e. liability and damages. Strand, stands for the proposition that if, once liability is established, the amounts owing, i.e. damages, are impossible to ascertain, the parties may reach a private, unsupervised settlement as to the amount of damages.

The instant case is not one where liability has been established and the only dispute is as to the amount owing. Respondent vehemently denies any liability. Thus, this case clearly does not fit within the Strand exception.

The Sixth Circuit's fact-law distinction does not lend itself to easy application in either FLSA or ADEA cases. Gangi itself involved a combination of legal and factual issues. Certainly whether Respondent discharged Petitioner in violation of the ADEA

involved both questions of law and fact and is not a pure question of fact such as the number of hours worked or the regular rate of pay referred to in Gangi. ADEA cases involve mixed questions of law and fact.[5]

The Sixth Circuit chose to fashion the rule, in part based upon its perception of the differences between FLSA claimants and Petitioner. The majority opinion places great weight on the fact that Petitioner is an attorney. As Judge Engle pointed out in his dissenting opinion, such considerations ignore the clear intent of Congress:

> "...I submit that while there may be differences, evident to Congress as well as the courts, between the classes protected by the ADEA and FLSA, I can discern no less solicitude toward the aging worker, either in the language of the ADEA or in its legislative history. The ADEA itself reflects this when, in its statement of findings and purpose, the Act states, "older workers find themselves disadvantaged in

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[5] Typical ADEA cases involve questions of motivation, statistics, disparate treatment, pretext, which are generally not pure questions of law or fact.

their efforts to retain employment..." 29 U.S.C. § 621. Surely Congress was aware when it enacted the ADEA that causes of action and hence appropriate remedies would differ under the ADEA and the FLSA, yet it adopted and has since retained the remedial mechanism of the FLSA. Furthermore, I fail to see that the distinctions relied upon by the majority compel this judicial amendment...

One might doubt the wisdom of Congress in enacting or structuring the ADEA, or believe that, however well intentioned, the ADEA in its overall impact has been counterproductive to the continued employment of the elderly; that judgment, however, it is not ours to make. When Congress, with its broad investigatory machinery, concludes that the ADEA's remedial mechanism must be changed, it will act. Meanwhile, I believe we must accord the elderly the full strength and protections of the remedies afforded them...

Even lawyers can experience hard choices when, approaching advanced age, they are faced with discharge after years of service to a corporate employer. But even more important, that vast majority of persons intended to be benefitted by the Act will not be attorneys, nor possessed of

> an attorney's sophistication in legal matters. Obviously, Congress intended the Act to apply to a broad class of persons, limited only by the limits of age. It did not include language separating lawyers from all others in the class."

In any event the "fact-law" distinction simply does not serve the purpose of the no-waiver rule or address the policies underlying the ADEA and FLSA. The danger of employer overreaching, where there is inequality of bargaining power, is present regardless of whether the dispute is of fact or of law. The 'knowing and voluntary' standard of Title VII simply does not go far enough to protect victims of age discrimination, forced by economics to sign a sub-standard settlement agreement.

II. THE COURT DISREGARDED THE SPECIFICITY OF RELEASE REQUIREMENT SET FORTH IN ALEXANDER VS. GARDNER DENVER CO., 415 U.S. 36 (1974)

The instant release is a very general, broad release. There is no mention whatsoever of claims of age discrimination, ADEA rights or of statutory rights in general.

In Alexander vs. Gardner Denver Co., 415 U.S. 36 (1974) the Supreme Court set forth the requirement that any release of statutory rights must be specific:

> "In this case, petitioner and respondent did not enter into a voluntary settlement expressly conditioned on a waiver of petitioner's cause of action under Title VII"

(at 52 n. 15, emphasis ours)

Subsequent Circuit Court decisions have also required a "degree of specificity" in release forms and have agreed that 'waiver of a federal remedial right is not lightly to be inferred" Lyght vs. Ford Motor Company, 643 F.2d 435 (6th Cir. 1981); Watkins vs. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1975) Accord: Valenti vs. International Mill Services, 610 F.Supp. 36 (E.D. Pa. 1985).

Because Runyan's release does not expressly cover claims of age bias, it fails to meet the Alexander specificity test.

In his dissenting opinion, Judge Engle concurred:

> "I believe I should still have great difficulty in upholding a settlement and waiver that failed altogether to make any mention of rights under the ADEA. It seems to me that only a bright line requirement that any waiver, to be effective as to ADEA rights at all, must expressly mention them in order to give substantial measure of protection to the class."

Where releases are not the product of negotiations concerning a dispute over an asserted claim, the Courts must exercise special scrutiny. As stated in Callen vs. Pennsylvania Railroad, 332 U.S. 625 (1941): "A release is not a device to exempt from liability but a means of compromising a claimed liability". Requiring specificity will ensure that the employee's release is indeed "knowing and voluntary".

III. THE VALIDITY OF RELEASES OF ADEA RIGHTS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH NEEDS TO BE CLARIFIED BY THIS COURT.

This is a case of national importance. Public concern is shown by numerous articles discussing the case.[6] The American business establishment is extremely interested. They filed four amicus briefs in the Sixth Circuit.[7] Corporations are engaged in massive reorganization of the work force. Thousands of older workers are being asked to "voluntarily" retire in exchange for accelerated early retirement benefits or severance pay. Victims of age discrimination face a Hobson's chance - accept the small

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[6] Wall Street Journal, June 11, 1985
National Law Journal, June 17, 1985
Lawyer's Alert, May 27, 1985
Employment Alert, May 30, 1985
Vol. II. No. 2 Employee Relations Law Journal, p. 322.
Indianapolis Business Journal
June 24-30 Issue, 1985

[7] Eaton Corp., Firestone Tire & Rubber Co. and IRW, Inc.; Chamber of Commerce of the United States; Center for Public Resources (a national coalition of 150 major corporations); Equal Employment Advisory Council (160 large employer, trade, and industry associations).

retirement package or face the threat of dismissal with no benefits. The business community does not want any interference with their "belt tightening" programs which heavily impact on older workers. They are fearful of judicial or EEOC interference with their ability to require early retirees to sign "knowing and voluntary" releases of ADEA rights. The EEOC and the AARP, the voice of older Americans, are also concerned.[8]

The Runyan "fact/law" rule will not protect older workers from employer overreaching. Furthermore, neither employers, employees, or EEOC will be able to determine which disputes are "factual" and capable of compromise and which disputes are primarily "legal" and require EEOC supervision.

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[8] See Proposed Regulation issued by the EEOC 50 Fed. Reg. 40870 and comments of the American Association of Retired Persons (AARP) filed December 6, 1985 with the EEOC.

In addition there is now a conflict among the circuits concerning the degree of specificity needed in a release of statutory rights.

CONCLUSION

The lower court has created a new rule that is contrary to applicable Supreme Court FLSA cases and violates the enforcement provisions of the ADEA. The Runyan "law-fact" distinction does not support the policies of either the FLSA or the ADEA and is totally unworkable.

Requiring a "degree of specificity" in releases which purport to waive federal statutory rights is sound law. Alexander vs. Gardner Denver requires that a waiver of Title VII rights be "express". ADEA claimants should be afforded the same protection.

These issues are of extreme importance. Thousands of older Americans will be asked to sign releases of all legal rights in the

months ahead. They as well as employers, EEOC, and the lower federal courts need guidance from this Court.

Review on certiorari is therefore necessary.

PRAYER

For the foregoing reasons, Petitioner prays that a writ of certiorari issue directed to the United States Court of Appeals for the Sixth Circuit in this case to the end that the order of that Court and the order of the United States District Court, for the Southern District of Ohio, Western Division, may be reviewed by this Court and reversed and remanded with direction that the motion for summary judgment be denied and that the matter proceed to trial.

Respectfully submitted,

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STATE OF OHIO)
) SS
HAMILTON COUNTY)

I, PAUL H. TOBIAS, after first being duly sworn according to law, do hereby certify that three (3) copies of the foregoing Petition have been deposited in a United States mailbox with first class postage prepaid on July 2nd, 1986 and sent to Armistead W. Gilliam, Jr., Esq., Smith & Schnake, 2000 Courthouse Plaza, N.E., P.O. Box 1817, Dayton, Ohio 45401, counsel for Respondent.

_____
Paul H. Tobias
Attorney for Petitioner

Sworn and Subscribed to in my presence this _____day of July, 1986.

_____
Notary Public

APPENDIX "A"

No. 83-3862

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD RUNYAN, Plaintiff-Appellant v. NATIONAL CASH REGISTER CORP., Defendant-Appellee	))))))))	ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed April 7, 1986

Before: LIVELY, Chief Judge; ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, CONTIE, KRUPANSKY, WELLFORD, MILBURN, GUY and NELSON, Circuit Judges.

WELLFORD, Circuit Judge, delivered the opinion of the court in which LIVELY, C.J., KEITH, MERRITT, KENNEDY, MARTIN, CONTIE, KRUPANSKY, MILBURN, GUY and NELSON, JJ.,

joined ENGEL, J., (pp. 14-16) delivered a separate dissenting opinion, in which JONES, J., joined.

WELLFORD, Circuit Judge, Richard Runyan appeals an order of the District Court for the Southern District of Ohio granting National Cash Register Corporation's (NCR) motion for summary judgment. The court dismissed Runyan's allegation that his discharge was discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 9 U.S.C. §§621-634 (1982). Applying Title VII analysis, the district court concluded that a general release knowingly signed by Runyan on November 25, 1977, was a complete bar to Runyan's ADEA claim, that a bona fide dispute existed respecting the reason for Runyan's termination, and that the consideration Runyan received for signing the release was adequate and not contrary to public policy. Runyan argued on appeal that his unsupervised release cannot bar his

private ADEA cause of action because the ADEA incorporates the enforcement provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§216-217 (1982). A panel of this court agreed and reversed the district court. Runyan v. National Cash Register Corp., No. 83-3862 (6th Cir. Apr. 22, 1985). The Panel majority held that a release of rights under the ADEA, unsupervised by the Equal Employment Opportunity Commission or by a court, is void as a matter of law. A majority of judges in active service voted to rehear the case en banc, thus vacating the panel opinion and the previous judgment of the court. Rule 14, Rules of the Sixth Circuit. Following supplemental briefing, the case was argued before the full court. For the reasons that follow, we hold that a private unsupervised release under the circumstances of this case may waive ADEA rights, and thus affirm the district court.

I. BACKGROUND

While we adopt the facts set forth in the district court's opinion, see Runyan vs. NCR Corp., 573 F. Supp. 1454, 1456-57 (S.D. Ohio 1983), we set out a further summary. NCR hired Runyan, who was born in 1918, at age fifty-three as an assistant general counsel in NCR's corporate legal department. In early 1977, James E. Rambo, vice president and general counsel at NCR, informed Runyan the company was going to terminate him for unsatisfactory performance. During the meeting, Runyan, then fifty-nine and an experienced labor lawyer, told Rambo that he felt his "termination was related to age discrimination"

After several subsequent discussions between Runyan and various representatives of NCR, the parties executed a written "Consulting Agreement", which became effective on June 1, 1977, but was to terminate on May 31, 1978. This agreement provided that Runyan

would receive $150 per day, with a guaranteed minimum of $2,333 per month, in exchange for Runyan's continuing legal services as a consultant. In November 1977 Runyan approached Rambo and requested that NCR extend the agreement beyond May 31, 1978, and increase the compensation Runyan was receiving under the agreement. After discussing Runyan's request with other officials of NCR, Rambo told Runyan that the company would not extend the agreement, but that it would increase Runyan's compensation to a guaranteed minimum of $4,000 per month from November 1, 1977, through May 31, 1978. NCR conditioned this increased compensation, however, on Runyan's executing a release of all claims he had or may have against NCR relating to his employment and termination.

On November 25, 1977, the parties entered into a written amendment to the prior consulting agreement, increasing Runyan's compensation to a guaranteed monthly minimum

of $4,000 to the time of termination. At the same time, Runyan signed an "Accord and Satisfaction, Release and Discharge," which provided:

> In consideration of the "Amendment to Consulting Agreement" executed by NCR on November 25, 1977, receipt of which is hereby acknowledged and which I acknowledge to be in full accord and satisfaction of any and all claims I may have against NCR arising out of the course of my employment and/or the termination of any employment and in further consideration of the said "Amendment to Consulting Agreement," I, Richard V. Runyan hereby release and forever discharge NCR, its successors, assigns, transferees, officers, employees, representatives and agents from all manner of action and actions, cause and causes of action, suits, debts, contracts, controversies, agreements, promises, damages, and demands whatsoever in law or in equity, which against NCR, I, Richard V. Runyan , ever had, now have or which I hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, save and except the aforementioned "Amendment to Consulting Agreement" of November 25, 1977, and the underlying "Consulting Agreement of June 1, 1977."

I have read this release and understand all of its terms. I execute it voluntarily and with full knowledge of its significance.

(Emphasis added.)

On May 31, 1978, the consulting agreement expired by its own terms and Runyan's working relationship with NCR ended. Runyan accepted the increased compensation promised him. On November 27, 1978, Runyan filed a charge of age discrimination against NCR with the Secretary of Labor,[1] and on May 22, 1980, commenced this ADEA action in the district court.

II. WAIVER UNDER THE FLSA AND ADEA

Runyan's principal argument on appeal is that an unsupervised waiver of his statutory rights cannot bar his private action under the

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[1]Under the 1977 Reorganization Act, the President transferred authority over ADEA claims from the Secretary of Labor to the Equal Employment Opportunity Commission (EEOC). We have held that the transfer, accomplished through the use of a legislative veto, was constitutional. See Mueller Optical Co. v. EEOC, 743 F.2d 380 (6th Cir. 1984). This change does not effect this appeal.

ADEA. This argument is based on Congress' incorporation into the ADEA of the enforcement provisions of the FLSA, and the issue raised is one of first impression in this court. To resolve this issue, we review the historical development of the FLSA and the ADEA.

In 1938 Congress enacted the FLSA to provide for a standard minimum wage and to require additional compensation for overtime work.[2] Section 216 provides in part:

> Any employer who violates the provisions...of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

29 U.S.C. §216(b) (1982). The FLSA is silent on whether an employee can release his or her right to wages or liquidated damages. Seven years after enactment, however, in Brooklyn

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[2]29 U.S.C. §206 provides for a standard minimum wage for employees engaged in commerce or in the production of goods for commerce. 29 U.S.C. § 207 requires that such employees be compensated at a rate equal to one and one half times the regular rate for hours worked in excess of a forty hour workweek.

Savings Bank v. O'Neil, 324 U.S. 697 (1945), the United States Supreme Court considered whether an employee subject to the FLSA could waive or release his right to liquidated damages under § 216. In each of three consolidated cases before the Court, the employer had obtained a release from its employee in exchange for an amount less than the employee's full FLSA entitlement.[3]

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[3] Brooklyn Savings Bank employed O'Neil as a night watchman for its eleven-story office building. He claimed to have worked several overtime hours, but had not received compensation at the FLSA-prescribed time and a half rate. Brooklyn Savings offered O'Neil, and he accepted, a check for $423.16 in exchange for a release of all claims. The check covered the appropriate statutory overtime amount, but no liquidated damages under § 216(b).

In the second consolidated case, a box factory employee worked certain hours of statutorily defined overtime. His employer offered him a check for $500.00, an amount less than the overtime compensation to which the employee was entitled, in exchange for a release of all FLSA rights. Both parties were aware that under the FLSA more than $500.00 was due to the employee. The employee sued for the balance of statutory compensation due and liquidated damages.

In the last of the consolidated cases, the

(footnote continued)

The Court, influenced by its perception of legislative intent, held that an employee cannot privately waive his rights to liquidated damages, at least when no bona fide dispute exists between the parties regarding the FLSA's coverage:

> The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency...To accomplish this purpose, standards of minimum wages and maximum hours were provided. Neither petitioner nor respondent suggests that the right to the basic statutory minimum wage could be waived by an employee subject to the Act. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

(footnote continued from previous page) employee accepted a delayed payment of statutory overtime compensation, which the employer asserted was a release of any claim to liquidated damages under the FLSA.

Id. at 706-07 (footnote omitted)(emphasis added). The Court did not decide whether an employee can waive the right of liquidated damages when a bona fide dispute regarding FLSA's coverage does exist.

The Supreme Court partially resolved the question left open in O'Neil and Schulte, Inc. v. Gangi, 328 U.S. 108 (1946).[4] The Court addressed whether the FLSA precludes a bona fide settlement of a bona fide dispute over

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[4]Gangi concerned building and maintenance employees. Each had put in varying hours of overtime for which no payment had been made prior to the Supreme Court's decision in Kirschbaum Co. v. Walling, 316 U.S. 517 (1942), in which service and maintenance employees in buildings tenanted by manufacturers producing for interstate commerce were held to be covered by the FLSA. The employees then made claims for overtime compensation and liquidated damages. The employer refused to pay on the grounds that its tenants did not ship their products directly into interstate commerce. Under threat of suit, the employer paid the overtime compensation and obtained a release of further claims from the employees.

the Act's coverage on a claim for overtime compensation and liquidated damages in full. The Court concluded:

> We think the purpose of the Act, which we repeat from the O'Neil case was to secure for the lowest paid segment of the Nation's workers a subsistence wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage.

Id. at 116 (footnote omitted.)[5]

Although the Court in Gangi held that the settlements of bona fide disputes as to coverage of the Act are invalid, it specifically did not "consider...the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment." Id. at 114-15 (footnote

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[5] It was the strong language that prompted Congress to enact the Portal-to-Portal Act in 1947. 29 U.S.C. § 260 (1982). That statute gave courts the discretion to withhold an award of liquidated damages upon the employer's satisfactory showing that the act or omission giving rise to the FLSA claim was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of the FLSA.

omitted). The Court cited Strand v. Garden Valley Telephone Co.., 51 F.Supp. 898 (D. Minn. 1943), as addressing the remaining issue it left open. 328 U.S. at 115 n.10. In Strand, the district court distinguished bona fide disputes over legal issues-for which settlement agreements are not valid-from bona fide disputes over factual issues-for which compromises or settlements are valid and binding. 51 F.Supp. at 904-05; accord Rigopoulos vs. Kervan 47 F.Supp. 576 (S.D.N.Y. 1942)(settlement not bar to recovery of liquidated damages absent allegation that an honest dispute existed respecting whether employees had worked overtime hours); Weiss vs. Testrite Instrument Co., 272 A.D. 696, 74 N.Y.S.2d 673 (1947); Cassese vs. Maufacturers Trust Co., 182 Misc. 344, 46 N.Y.S.2d 621 (N.Y. City of Ct. 1943).

Congress enacted the ADEA in 1967. In § 7(b) of the Act, as codified at 29 U.S.C. § 626(b), Congress expressly incorporated the enforcement provisions of the FLSA:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title... Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, that liquidated damages shall be payable only in cases of willful violations of this chapter...

29 U.S.C. §626(b)(1982). Neither the Act nor its legislative history explicitly addresses whether ADEA rights may be privately released.[6]

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[6]Plaintiff maintains that Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981) and Tony and Susan Alamo Foundation v. Secretary of Labor, 105 S. Ct. 1953 (1985), require application of the no waiver rule to all unsupervised ADEA releases. But Barrentine and Alamo are clearly distinguishable from the present case. Fist they both concerned the waiver of legal coverage under the FLSA. In Barrentine the issue was whether the FLSA required the employer to pay employees for time they spent complying with safety requirements. 450 U.S. at 730-32. The issue was not whether the employees made the safety inspections or how

(footnote continued)

The purpose behind enactment of the ADEA and the earlier enactment of the FLSA are, however, obviously different. The later pertained to all workers governed by a national standard setting minimum compensation for workers and to secure "the lowest paid segment...a subsistence wage." Gangi, 328 U.S. at 116. The ADEA, on the other hand, addressed itself to an entirely different segment of employees, many of whom were highly paid and capable of securing legal assistance without difficulty. Congress intended to

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many hours they worked. Rather, the issue was whether the FLSA requires compensation for this kind of work performed by these employees. In Alamo the workers wanted to stipulate that their work was "voluntary" and therefore not covered under the FLSA. 105 S.Ct. at 1962. Neither of these cases concerned the resolution of the type of factual issue referred to in Gangi. Second, Barrentine and Alamo concerned an FLSA claim, not an ADEA claim as in the present case. In Barrentine and Alamo the Court reiterated the well known problems arising from the unequal bargaining positions of employers and employees, 105 S.Ct. at 1962 and "substandard wages and oppressive working hours," 450 U.S. at 739. FLSA cases implicate these concerns to a significantly greater degree than do ADEA cases.

protect this group from discrimination in favor of younger employees. In accordance with the distinction between FLSA and ADEA claimants, a practice, even if not officially sanctioned, has developed that permits effectuating and recognizing settlements of ADEA disputes that employees and employers have worked out in good faith without agency involvement.

III. WAIVER IN THIS CASE

In applying the law to the facts of this case, we are mindful that we must assume that Congress, by referring to the FLSA enforcement provisions in enacting the ADEA, was aware of judicial interpretation of the FLSA. Lorillard v. Pons, 434 U.S. 575 (1978). But we are satisfied that the present case concerns an issue that the Supreme Court in Gangi specifically left undecided. In this case, a bona fide dispute does not exist concerning whether NCR discharged Runyan in

violation of the ADEA. The dispute is not over legal issues such as the ADEA's coverage or its applicability. Rather, the parties contest factual issues concerning the motivation and intent behind NCR's decision to discharge Runyan. This case presents the precise issue not resolved in O'Neil and Gangi.[7] It presents an issue analogous to the factual dispute discussed in Strand and the other cases cited earlier, respecting which those courts would have found settlements valid and binding.[8]

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[7]The Fifth Circuit's decision in United States v. Allegheny Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert denied, 425 U.S. 944 (1976), supports our narrow reading of O'Neil and Gangi. In Allegheny-Ludlum, the court declined to extend the highly protective public policy rationale of O'Neil and Gangi to the Title VII context. Id. at 86. The court alluded to the viability of the Strand limitation on Gangi. It held that O'Neil and Gangi do not prohibit employees from "accept[ing] compromise payments and waiv[ing] their claims for further relief in situations where the fact of liability or the amount thereof is disputed." Id. at 860.

[8]It is not surprising that the courts have found FLSA releases unenforceable given the nature of the factual issues they concern. In

(footnote continued)

Accordingly. we hold that an unsupervised release of a claim in a bona fide dispute of this type under these circumstances is not invalid.[9] In this case it is clear that Runyan is not among the "lowest paid segment of the nation's workers" who likely have little education and little understanding of their legal rights, a factor which the Court

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FLSA cases the factual issues concern the number of hours worked and the base pay rate-both of which are amenable to determination with some precision. In ADEA cases, on the other hand, the factual issues frequently concern determination of motive and intent, controversies that are more difficult to resolve.

[9]Several previous cases in this circuit have pointed toward the result we reach today. In Ott v. Midland Ross Corp., 500 F.2d 26 (6th Cir. 1979), defendant argued that a valid release bared plaintiff's ADEA claim. The plaintiff argued that the court should estop defendant from enforcing the release because it was fraudulently induced. The court did not indicate that the release was void as a matter of law. It assumed the release would be valid if not fraudulently induced. 600 F.2d at 30 n.6. See also Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982) (held waiver of ADEA claim valid without discussing the need for EEOC supervision; the facts as discussed in the opinion suggest that the EEOC did not supervise the release).

in O'Neil and Gangi deemed very important. Rather, Runyan is a well-paid, well-educated, labor lawyer with many years of experience in this area. Indeed, evidence in the record suggests Runyan tried to take advantage of NCR by taking the full benefit of a reasonable and understood bargain, while attempting to part with what he thought might be only illusory consideration in return. The release in this case was knowingly and deliberately executed by an attorney knowledgeable in labor law and employment discrimination matters.[10] It is very different from cases concerning releases of FLSA claims by lay persons seeking payment of minimum wages, in amounts ascertainable by uncomplicated methods, usually with little knowledge of their legal rights.

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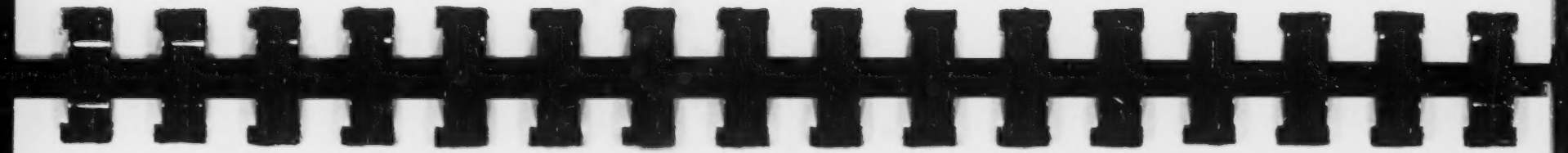
[10] We reject Plaintiff's argument that the waiver does not apply to ADEA claims because it did not specifically refer to the ADEA. In determining whether Plaintiff knowingly and voluntarily waived his ADEA claims, we apply ordinary principles.



IV. WAIVER IN ADEA CASES

We have decided that under particular circumstances employers and employees may negotiate a valid release of ADEA claims. We recognize, however, that in accord with concerns expressed in O'Neil and Gangi courts should not allow employers to compromise the underlying policies of the ADEA by taking advantage of a superior bargaining position or by overreaching. Justice Frankfurter, in his Gangi dissent, 328 U.S. at 121-22, noted the importance of good faith in entering settlements and in approving a waiver of rights in this type of situation.

> Before a hitherto familiar and socially desirable practice is outlawed, where overreaching or exploitation is not inherent in the situation, the outlawry should come from Congress.
>
> ...Strict enforcement of the policy which puts beyond the pale of private arrangement minimum standards of wages and hours fixed by law does not call for disregard of another policy, that of encouraging amicable settlement of honest differences between men dealing at arm's length with one another.

Id. at 122.

In determining whether an ADEA settlement and release is valid, a court should apply the principles expressed by Justice Frankfurter that encourages "amicable settlement of honest differences...where overreaching or exploitation is not inherent in the situation." Ordinary contract principles would apply in such a situation as stated in footnote ten. We note that the EEOC has specifically proposed "allowing for non-EEOC supervised waivers and releases of private rights under the ADEA." Draft Notice of Proposed Rule making, reprinted in 141 Daily Lab. Rep. (BNA) A-6, A-7 (July 23, 1985). The agency's expressed basis for this proposal is its preference to encourage voluntary resolution of disputes under the ADEA.[11] We

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[11]The EEOC notes that this is similar to the policies encouraging settlement of cases concerning rights under Title VII of the Civil Rights Act of 1964.

share the expressed views of the agency charged with responsibility of enforcement of the ADEA.

Accordingly, we hold that Runyan's release is valid and the district's court's judgment is AFFIRMED.

ENGEL, Circuit Judge, joined by Jones, Circuit Judge, dissenting. I respectfully dissent. I adhere to my views expressed in the original panel opinion. 37 F.E.P. Cases (BNA) 1086 (6th Cir. 1985), vacated F.E.P. Cases (BNA) 5 (6th Cir. 1985). My comments augment the rationale of Judge DeMascio in that opinion. I concurred in that opinion primarily because I believed its result most closely reflectED the intent of Congress, which preferred the remedial procedures of the Fair Labor Standards Act, as applied in Brooklyn Savings Bank v. O'Neil, 324 U.S. 197 (1945), and Schulte, Inc. v. Gangi, 328 U.S. 108 (1946), over those of Title VII. See Lorillard v. Pons, 434 U.S. 575 (1975). The

majority may propose a better contrived rule, but in my opinion, it lacks fidelity to the intent of Congress.

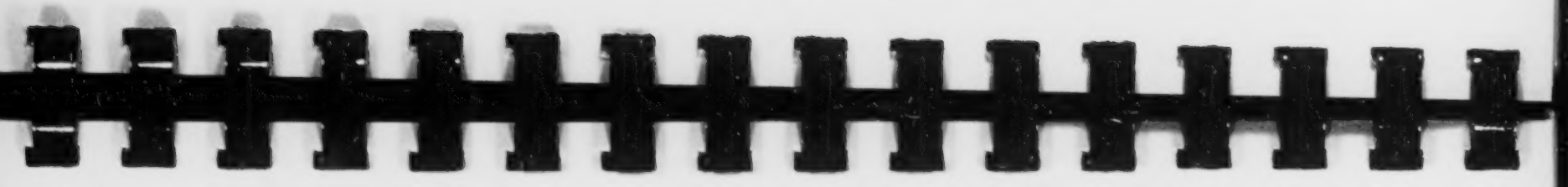
The majority opinion concedes that O'Neil and Gangi prohibit unsupervised releases of ADEA claims when the dispute concerns the coverage of the Act or some other legal issue. It holds, however, that because the dispute here involves a factual issue, NCR's intent in discharging Runyan, the present case falls within the area expressly left undecided by O'Neil and Gangi. It then concludes that unsupervised releases of ADEA claims are valid where the parties contest factual matters and the release does not violate ordinary principles of contract law.

I am not persuaded. It seems to me that the majority ignores the logic of the principal decisions of the Supreme Court in favor of a reasoning that it imputes to a mere exemption lodged in a footnote. I submit that while there may be differences, evident to

Congress as well as the courts, between the classes protected by the ADEA and FLSA, I can discern no less solicitude toward the aging worker, either in the language of the ADEA or in its legislative history. The ADEA itself reflects this when, in its statement of findings and purpose, the Act states, "older workers find themselves disadvantaged in their efforts to retain employment..." 29 U.S.C. § 621. Surely Congress was aware when it enacted the ADEA that causes of action and hence appropriate remedies would differ under the ADEA and the FLSA, yet it adopted and has since retained the remedial mechanism of the FLSA. Furthermore, I fail to see that the distinctions relied upon by the majority compel this judicial amendment. The relative availability of legal counsel for ADEA claimants may do little to equalize the disparity of bargaining power between employees and employers when the dispute centers on a factual question of employer

intent. And while factual disputes in ADEA claims may offer less opportunity for certain resolution, the increased uncertainty of their claims does not place ADEA claimants in a better position with respect to their employers than FLSA claimants, or otherwise compel a diminution of their statutory protections.

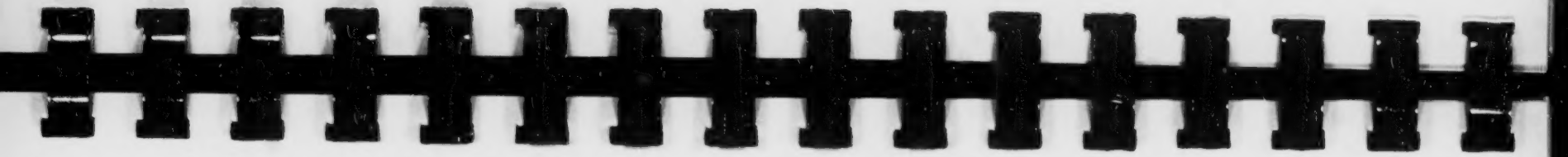
One might doubt the wisdom of Congress in enacting or structuring the ADEA, or believe that, however well intentioned, the ADEA in its overall impact has been counterproductive to the continued employment of the elderly; that judgment, however, is not ours to make. When Congress, with its broad investigatory machinery, concludes that the ADEA's remedial mechanism must be changed, it will act. Meanwhile, I believe we must accord the elderly the full strength and protections of the remedies afforded them.



Admittedly, on its face this is not an attractive case. One is left with the distinct impression that Runyan, himself a lawyer, artfully deceived his employer by drafting a release which made no mention of the ADEA claim. Perhaps so, but as much might also be said of NCR when it executed the release. Perhaps both took the chance: Runyan that NCR would not notice the failure to refer to the ADEA claim, and NCR that Runyan might initially overlook the possibility and later consider himself barred from asserting his rights under the ADEA. It is idle, however, to believe that even here the parties enjoyed parity of bargaining power. Even lawyers can experience hard choices when, approaching advanced age, they are faced with discharge after years of service to a corporate employer. But even more important, the vast majority of persons intended to be benefitted by the Act will not be attorneys, nor possessed of an attorney's

sophistication in legal matters. Obviously, Congress intended the Act to apply to a broad class of persons, limited only by the limits of age. It did not include language separating lawyers from all others in the class.

Even if I were convinced by the majority that the original panel's assessment of Congressional intent was incorrect and that unsupervised settlements were allowable, I believe I should still have great difficulty in upholding a settlement and waiver that failed altogether to make any mention of rights under the ADEA. It seems to me that only a bright line requirement that any waiver, to be effective as to ADEA rights at all, must expressly mention them in order to give substantial measure of protection to the class. Such a rule would at least keep the vast majority of cases out of the courts. Any employee seeking relief, notwithstanding a specific waiver, would of course rightfully



bear the burden of establishing traditional equitable grounds for avoidance or rescission before overcoming the effect of such a waiver. While this would probably require reversal of the district court judgment in this appeal, it would still in my view be justified and hold truer to Congressional intent than the position taken by the majority.

APPENDIX "B"

No. 83-3862
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Richard Runyan, Plaintiff-Appellant	) On Appeal from the United States District Court from the Southern District of Ohio
v.	)
NATIONAL CASH REGISTER CORP. Defendant-Appellee	)

Decided and Filed April 22, 1985

Before: Engel and Wellford, Circuit Judges; and DEMASCIO, District Judge.*

DEMASCIO, District Judge, delivered the opinion of the Court, in which ENGEL, Circuit Judge, joined. WELLFORD, Circuit Judge (pp. 13-16) delivered a separate dissenting opinion.

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* Hon. Robert E. DeMascio, United States District Judge, Eastern District of Michigan, sitting by designation.

DEMASCIO, District Judge. Richard Runyan appeals an order of the District Court of the Southern District of Ohio granting National Cash Register Corporation's (NCR) motion for summary judgment dismissing Runyan's allegation that he was discriminatorily discharged in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621. Applying Title VII analysis, the district court concluded that a general release knowingly signed by Runyan on November 25, 1977 constituted a complete bar to Runyan's ADEA claim, that a bona fide dispute existed with respect to the reason for Runyan's termination, and that the consideration Runyan received for signing the release was adequate and not at all contrary to public policy. Runyan argues on appeal that since the ADEA adopts the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§216-17 (1938), the unsupervised release he executed could not bar

his private suit. For the reasons that follow, we hold that ADEA rights cannot be waived by a private unsupervised release.

I

We adopt the facts contained in the district court's opinion. Runyan, born in 1918, was hired by NCR at age 53 as an assistant general counsel in NCR's corporate legal department. In early 1977, Runyan was informed by James E. Rambo (Rambo), Vice President and General Counsel at NCR, that, due to his unsatisfactory performance, Runyan's employment would be terminated effective May 1, 1977. During this meeting, Runyan, then 59, indicated to Rambo that he felt that his "termination was related to age discrimination"

After several subsequent discussions between Runyan and various representatives of NCR, the parties executed a written

"Consulting Agreement" which became effective on June 1, 1977, and was to terminate on May 31, 1978. This agreement provided that Runyan would receive $150 per day, with a guaranteed minimum of $2,333 per month, in exchange for Runyan's performance of legal services on a consultant basis. In November 1977, Runyan approached Rambo and requested that the agreement be extended beyond May 31, 1978 and that he be given an increase in the amount of compensation he was receiving under the agreement. After discussing Runyan's requests with other officers of NCR, Rambo informed Runyan that the agreement could not be extended, but that his compensation would be increased to a guaranteed minimum of $4,000 per month from November 1, 1977 through May 31, 1978 in consideration for Runyan executing a release of all claims he had or may have against NCR relating to his employment and termination.

On November 25, 1977, the parties entered into a written amendment to the consulting agreement, which increased Runyan's compensation to a guaranteed minimum of $4,000. At the same time, Runyan signed an "Accord and Satisfaction, Release, and Discharge," which provided:

> I, Richard V. Runyan, hereby release and forever discharge NCR, its successors, assigns, transferees, officers, employees, representatives and agents from all manner of action and actions, cause and causes of action, suits, debts, contracts, controversies, agreements, promises, damages, and demands whatsoever in law or in equity, which against NCR, I Richard V. Runyan, ever had, now have, or which I hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these present, save and except the aforementioned "Amendment to Consulting Agreement" of November 25, 1977, and the underlying "Consulting Agreement of June 1, 1977".

I have read this release and understand all of its terms. I execute it voluntarily and with full knowledge of its significance.

On May 31, 1978, the consulting agreement expired by its own terms and Runyan's working relationship with NCR came to an end. On November 27, 1978, Runyan filed a charge of age discrimination against NCR with the Secretary of Labor,[1] and on May 22, 1980, commenced this ADEA action in the United States District Court for the Southern District.

II

Runyan's principal argument on appeal is that an unsupervised waiver of his statutory rights cannot serve to bar his private action under the ADEA. This argument is based on Congress' incorporation into the ADEA of the enforcement provisions of the FLSA. This

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[1]Under the 1977 Reorganization Act, the President transferred authority over ADEA claims from the Secretary of Labor to the Equal Employment Opportunity Commission (EEOC). This Circuit has held that transfer, accomplished through the use of a legislative veto, was constitutional. See Muller Optical Co. v. EEOC, slip op. No. 83-5889 (6th Cir. September 4, 1984). This change does not impact the instant appeal.

circuit has not had an opportunity to address this issue and apparently neither have the other circuits. To resolve this issue, we find it necessary to review the historical development of the FLSA and the ADEA.

In 1938, Congress enacted the FLSA to provide for a standard minimum wage and to require additional compensation for overtime work.[2] Section 216 provides, in pertinent part:

> Any employer who violates the provisions ... of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional amount as liquidated damages.

The FLSA is silent with respect to whether an employee can release his/her right to wages or liquidated damages. Seven years after enactment, however, in Brooklyn Savings Bank

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[2] 29 U.S.C. §206 provides for a standard minimum wage for employees engaged in commerce or in the production of goods for commerce 29 U.S.C. § 207 requires that such employees be compensated at a rate equal to one and one half times the regular rate for hours worked in excess of a forty hour workweek.

v. O'Neil, 324 U.S. 697 (1945), the United States Supreme Court considered (a) whether an employee subject to the FLSA could waive or release his/her right to liquidated damages under § 216; and (b) whether an employee is entitled to interest on sums recovered as wages and liquidated damages. In each of these consolidated cases before the Court, the employer had obtained the release from its employee in exchange for an amount of wages less than the employee's full FLSA entitlement.[3]

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[3]Brooklyn Savings Bank employed O'Neil as a night watchman for its eleven story office building. He left the bank's service after two years, at which time he had worked several overtime hours for which he had not received compensation at the FLSA-prescribed time and a half rate. Brooklyn savings offered O'Neil, and he accepted, a check for $423.16 in exchange for a release of all claims. The check covered the appropriate statutory overtime amount, but did not include any payment for liquidated damages as set forth in § 216(b).

In the second case, the employee worked in a box factory from October 1938 to November 1942 putting in several hours of statutorily defined overtime. His employer offered him a check for $500.00, an amount less than the overtime compensation to which the employee

(footnote continued)

The Court, greatly influenced by its perception of the legislative intent behind the FLSA, held that an employee can not privately waive his/her right to liquidated damages, at least where there in no bona fide dispute as to the FLSA's coverage:

> The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency. To accomplish this purpose, standards of minimum wages and maximum hours were provided. Neither petitioner nor respondent suggest that the basic statutory minimum wage could be waived by an employee subject to the Act. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purpose of the Act. We are of the opinion that the

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was entitled, in exchange for a release of all FLSA rights. Both parties were aware that, under the FLSA, more than $500.00 was due to the employee. The employee then brought suit for $276.05 The balance of statutory compensation due, and $776.06, in liquidated damages.

In the last of the consolidated cases, the employee accepted a delayed payment of statutory overtime compensation, which the employer asserted constituted a release of any claim to liquidated damages under the FLSA.

> same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

Id. at 706.07 (citations omitted). The Court left open the question of whether an employee can privately waive the right to liquidated damages where there is a bona fide dispute as to the FLSA's coverage. The Court also held that interest is not recoverable on FLSA wages and liquidated damages, as this would tend to produce the undesirable result of allowing interest on interest, Id. at 715.

The question left open in O'Neil was resolved one year later in Schulte, Inc. v. Gangi, 328 U.S. 108 (1946). There, the Court addressed whether the FLSA precludes a bona fide settlement of a bona fide dispute over the Act's coverage on a claim for overtime compensation and liquidated damages where the employee received the overtime compensation in full.[4] The Court largely followed its

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[4]The respondents were building and maintenance
(footnote continued)

analysis in O'Neil, concluding that the same threats to the public purpose of the FLSA exist where there is a bona fide dispute over coverage:

> We think the purpose of the Act, which we repeat from the O'Neil case was to secure for the lowest paid segment of the Nation's workers a subsistence wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage.

(footnote continued from previous page) employees. Each had put in varying hours of overtime for which no payment had been made prior to the Supreme Court's decision in Kirschbaum Co. v. Walling, 316 U.S. 517 (1942), wherein service and maintenance employees in buildings tenanted by manufacturers producing for interstate commerce were held to be covered by the FLSA. The employees then made claims for overtime compensation and liquidated damages. The employer refused to pay on the grounds that its tenants did not ship their products directly into interstate commerce, but delivered them to intrastate third parties who in turn used the products for interstate commerce. Under threat of suit, the employer paid the overtime compensation and obtained a release of further claims from the employees.

Id. at 116 (footnote omitted). The Court also interpreted the FLSA's liquidated damages provision as a "mandatory requirement" in order to compensate the employee for the wrongful retention of his or her pay. Id.

It was this strong language that prompted Congress to enact the Portal to Portal Pay Act (Pay Act), 29 U.S.C. § 260 (1947). That statute gave courts the discretion to withhold an award of liquidated damages upon the employer's satisfactory showing that the act or omission giving rise to the FLSA claim was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of the FLSA.[5]

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[5]29 U.S.C. § 260 provides, in pertinent part:

> In any action ...to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the (FLSA), if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the (FLSA), the court may, in its grounds discretion, award no liquidated damages...

The next significant event was the passage of the ADEA in 1967. In § 626(b) of the Act, Congress expressly incorporated the enforcement provisions of the FLSA:

> The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in Section 11(b), 16 (except for subsection (a) therefore), and 17 of the Fair Labor Standards Act of 1938...Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the (FLSA). Provided that liquidated damages shall be payable only in cases of willful violations of the Act.

Again, neither the Act nor its legislative history speak to whether ADEA rights are capable of being privately released.

The United States Supreme Court had occasion to interpret one aspect of § 626(b)'s reference to the FLSA. In Lorillard v. Pons, 434 U.S. 575 (1978), the Court considered the question whether there is a right to a jury trial in private ADEA actions. Just as the ADEA does not speak to whether claims brought

pursuant thereto can be privately waived, neither does the Act contain any provision with respect to the right to a jury trial. The FLSA is also silent on the issue but the decisional law on point uniformly held that such a right exists in private FLSA actions.[6] In Lorillard, the Court began its analysis by exploring the legislative history behind the ADEA. While a number of alternative enforcement schemes for the Act were proposed,[7] the ultimate adoption of the FLSA scheme, with some modification, reflected "Congress' desire to use an existing statutory

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[6]See Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965); Lewis v. Times Publishing Co., 185 F.2d 457 (5th Cir. 1950); Olearchick v. American Steel Foundries, 73 F.Supp. 273 (W.D. Pa. 1947).

[7]Among the alternative proposals was one submitted by the Administration modeled after §§ 10(c), (e) of the National Labor Relations act, 29 U.S.C. §610 et seq. Another alternative was to adopt the pattern of Title VII and utilize the EEOC as the enforcement body. The proposal that was adopted was largely the FLSA model, with some modification.

scheme...and, on the other hand, its dissatisfaction with some elements of each of the preexisting schemes." Id. at 578.

In concluding that a right to jury trial exists in a private ADEA action, the Court assessed Congress' intent by its selective incorporation of the FLSA remedies into the ADEA:

> Long before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions pursuant to the FLSA. Indeed, every court to consider the issue had so held. Congress is presumed to be aware of an administrative or judicial interpretation when it re-enacts a statute without charge. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Id. at 580-81 (citations and footnotes omitted). The Court credited Congress with a detailed knowledge of the FLSA provisions and their judicial interpretation, citing

Congress' willingness to depart from those interpretations with which it was presumably dissatisfied:

> [I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation. For example, in construing the enforcement sections of the FLSA, the courts had consistently declared that injunctive relief was not available in suits by private individuals but only in suits by the Secretary. Congress made plain decision to follow a different course in the ADEA by expressly permitting "such...equitable relief as may be appropriate to effectuate the purposes of [the ADEA] including without limitation judgments compelling employment, reinstatement or promotion" "in any action brought to enforce" this Act. Similarly, while incorporating into the ADEA the FLSA provisions authorizing awards of liquidated damages, Congress altered the circumstances under such awards would be available in ADEA actions by mandating that such damages be awarded only where the violation of the ADEA is willful. Finally, Congress expressly declined to incorporate into the ADEA the criminal penalties established for violations of the FLSA.

Id. at 580-82.

The Court concluded that Congress' knowledge that the FLSA has been interpreted consistent with a right to jury trial, together with the legislature's failure to expressly withhold that right from the ADEA's incorporation of the FLSA's enforcement scheme, give rise to the inference that Congress intended such a right to be available in private ADEA actions.

In light of the historical development set forth above, we are compelled to conclude that the November 25, 1977 release executed by Runyan is not a bar to his ADEA action. Congress, when incorporating the FLSA enforcement provisions, and, specifically, § 216, is charged with knowledge of the Supreme Court's interpretation in O'Neil and Gangi that claims for wages and liquidated damages cannot be waived by executing an unsupervised release. In view of the alterations Congress made in areas where it was presumably dissatisfied with the judicial interpretation

of § 216, we must infer that, if it had so intended, Congress would have expressly provided that ADEA claims can be privately waived

Our conclusion becomes more certain in light of a recent decision of this Circuit when faced with an ADEA-FLSA interpretation question. In Rose vs. National Cash Register Corp., 703 F.2d 225 (6th Cir. 1983), another panel of this court followed Lorillard in concluding that the Portal to Portal Pay Act, supra, does not apply to ADEA actions.[8] Even more interestingly, that panel considered the

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[8]Rose had been employed as a salesman in NCR's Grand Rapids, Michigan office for 25 years. In June 1976, he was terminated at the age of 54. Contending that his termination was due to his age, Rose filed an ADEA claim in the Western District of Michigan. A trial was held and a jury verdict returned, awarding Rose $25,200 in lost wage and $20,650 in fringe benefits. The jury also found that NCR's violation of the act was willful. The trial court entered judgment for Rose in the amount of $48,850 plus an equal amount in liquidated damages. NCR appealed on several grounds, including the question whether the trial court erred in awarding liquidated damages without considering the purported good faith of the defendant.

question whether an employee could receive interest on sums recovered as a result of a successful ADEA action, In holding that the employee is not entitled to interest, the panel stated:

> [T]he Supreme Court held in Brooklyn Savings Bank v. O'Neil, that an employee is not entitled to both full liquidated damages and prejudgment interest under § 16 of the FLSA. Inasmuch as Congress incorporated the remedies of the FLSA into the ADEA and, since "Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law" Lorillard v. Pons, supra, this Court is of the opinion that the rule of Brooklyn Savings Bank, [O'Neil], is applicable to ADEA actions.

730 F.2d at 230 (citations omitted).

Thus, we conclude that the O'Neil-Gangi line of cases, holding that FLSA rights cannot be privately waived, is applicable to the ADEA as well.

It is indeed difficult to gather any excitement over Runyan's claim. He is a long time member of the Ohio Bar, yet he took advantage of an amendment to the original

consulting agreement that netted him approximately $12,000 in exchange for a release he believed to be of little or no value. As we interpret his deposition testimony, Runyan was quite confident that the release he signed would not be an acceptable bar to an ADEA claim.[9]

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[9]In his deposition testimony, Runyan admits his suspicion that the release was not valid, and, further, that he failed to manifest that suspicion to NCR:

> Well, when I, at the time I signed the release, well, I had two things occurred in my mind at that time. One is this release talks about releasing NCR and so forth from any claims I have by reason of any manner whatsoever to the beginning of the world to the day of this presence, and it seemed to me one thing that occurred to me at that time was that I was probably under the control of NCR and that it occurred to me that the release might not be valid, and also I remembered that in the labor board cases, releases were generally not accepted because those cases were held to be matters effecting the public interest and it seemed to me since there was a public policy against age discrimination, this type of release might be, private release might be against the public interest without, for example the

(footnote continued)

We would suppose that a member of the bar would deal more forthrightly with his former employer. Nevertheless, his legal acumen aside, Runyan falls within the class of employees protected by the ADEA and, consequently must be afforded the same rights as any other ADEA claimant. Since the November 27, 1977 release is not a bar to plaintiff's ADEA action, we see no need to address the remaining issues raised on this appeal.[10]

(footnote continued from previous page)
labor department being a party or what have you.

Runyan deposition, p. 95 of the Joint Appendix

It is curious that NCR did not raise an issue with respect to recision of the amendment based on fraud or misrepresentation.

[10]The remainder of Runyan's contentions on appeal speak to the validity of the release independent of his primary legal argument. If the Court were not disposing of this appeal on the primary issue, it is unlikely that the lower court would be reversed on any of the appellant's remaining, non-meritorious grounds.

Accordingly, the trial court's grant of summary judgment to defendant-appellee is hereby reversed and this action remanded to the district court.

WELLFORD, Circuit Judge, dissenting. I find myself in agreement with a substantial portion of the majority's historical analysis of the Fair Labor Standards Act (FLSA), and its conclusion that Age Discrimination in Employment Act (ADEA) actions must follow the FLSA enforcement provisions. I believe, however, that the majority misconstrues Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), and D. A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946). The validity of Runyan's broad release[11] is consistent with O'Neil,

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[11]Runyan's release included the following language, which immediately precedes the portion quoted by the majority:

> In consideration of the "Amendment to Consulting Agreement" executed by NCR on November 25, 1977, receipt of which is hereby acknowledged and which I acknowledge to be in full accord and satisfaction of any and all claims I may have against NCR arising out of the course of my employment and/or the termination of my employment and in further consideration of the said "Amendment to Consulting Agreement", I, Richard V. Runyan...

(Joint Appendix at 99) (emphasis added).

Gangi, and the legislative purposes behind the ADEA. Accordingly, I must dissent in this case of first impression in our court.

As the majority notes, the FLSA is silent with respect to whether an employee can release his right to wages or liquidated damages. In Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), the United States Supreme Court considered whether an employee subject to the FLSA could waive or release his right to liquidated damages under § 216. The Court held that an employee cannot privately waive his right to liquidated damages, at least when no bona fide dispute exists between the parties as to the FLSA's coverage or factual issues involved. Id. at 706-07. The court left open the question of whether an employee can privately waive the right to liquidated damages where there is a bona fide dispute as to the FLSA's Coverage on factual issues involved.

The question left open in O'Neil was only partially resolved in D. A. Schulte, Inc. vs. Gangi, 328 U.S. 108 (1946).[12] Although the Court in Gangi held that settlements of bona fide disputes as to coverage of the Act are invalid, it specifically did not "consider... the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment" Id. at 114-115. The Court cited Strand vs. Garden Valley Telephone Co., 51 Supp. 898 (D. Minn. 1943), as addressing the remaining issue it left open. See 328 U.S. at 115 n.10. In Strand, the court distinguished bona fide disputes over legal issues - for which settlement agreements are not valid - from bona fide disputes over factual issues - for which compromises or settlements would be valid and binding. 51 F.Supp. at 904-05. Accord Rigopoulos v.

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[12]The court, in Gangi, did not address the validity of releases when bona fide disputes exist over factual issues.

Hervan, 47 F. Supp. 576 (S.D.N.Y. 1942)(settlement not bar to recovery of liquidated damages absent allegation that an honest dispute existed with respect to whether employees had worked overtime hours); Cassese v. Manufacturers Trust Co., 46 N.Y.S.2d 621, 182 Misc. 344 (N.Y. City Ct. 1943); Weiss v. Testrite Instrument Co., 74 N.Y.S.2d 673, 272 App. Div. 696 (N.Y. App. Div. 1947).

In the instant case, a bona fide dispute exists concerning whether NCR discharged Mr. Runyan in violation of the ADEA. The dispute is not over legal issues such as the ADEA's coverage or applicability, rather the parties hotly contest factual issues concerning the motivation behind NCR's decision to discharge Runyan. Thus, the case presents the precise issue not resolved in O'Neil and Gangi and analogous to the factual disputes discussed in Strand and the other cases cited earlier, for which the courts would find settlements valid

and binding.[13] I would hold that the release signed by Runyan is not ineffective, and I do not find any controlling contrary precedent.

My decision on the facts of this case should not be interpreted to mean that all ADEA waivers should be enforceable. Courts should not allow policies of the ADEA to be compromised if an employer sought to take advantage of an employee because of superior bargaining position, or by forcing the employee to accept an unfair release for inadequate consideration. Justice Frankfurter, in his Gangi dissent, 328 U.S. at 121-22, noted the importance of good faith in entering settlements (and waivers):

> Before a hitherto familiar and socially desirable practice is outlawed, where overreaching or

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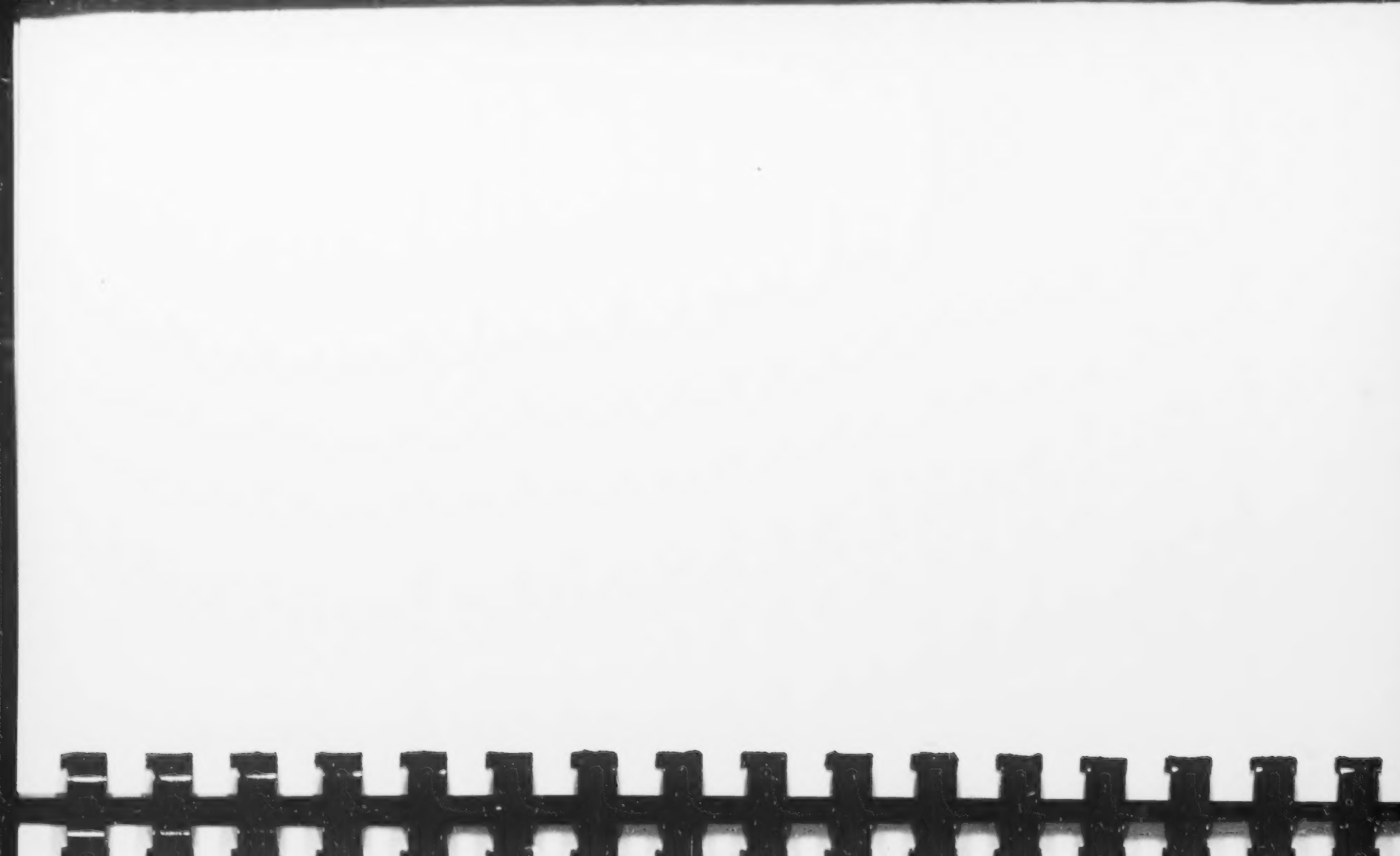
[13]Due to the nature of the factual issues involved in FLSA cases compared to ADEA situations it is not surprising that courts have found FLSA releases unenforceable. In FLSA situations the factual issues concern the number of hours worked and the base pay rate - both of which are amendable to determination with some precision. In ADEA situations, on the other hand, the factual issues frequently involve determinations of motive and intent, a different type of controversy.



> exploitation is not inherent in the situation, the outlawry should come from Congress.
>
> . . .
>
> Strict enforcement of the policy which puts beyond the pale of private arrangement minimum standards for wage and hours fixed by law does not call for disregard of another policy, that of encouraging amicable settlement of honest differences between men dealing at arm's length with one another.

Id. at 122.

Therefore, in determining whether an ADEA release is valid, a court should determine whether:

1. A bona fide factual dispute over liability exists between the parties,

2. The terms of the release and the supporting consideration are such as to dispel a likelihood of overreaching.

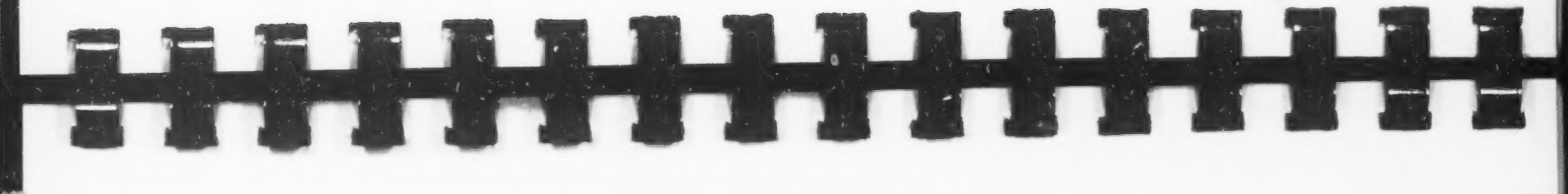
Runyan is not among the "lowest paid segment of the Nation's workers" who likely have little education and little understanding of their legal rights, a factor which the Court in O'Neil and Gangi deemed most

important. Rather, Runyan is a well-paid, well-educated, competent labor lawyer with many years of experience in this area. Indeed, any attempt to exploit, as the majority itself notes, was not initiated by NCR, but by Runyan who received the full benefit of his understood bargain, while attempting to part with only an illusory consideration in return.

The release knowingly and deliberately executed by the attorney-appellant experienced in labor law and employment discrimination matters, is simply different and distinguishable from the situation in the cases involving releases of FLSA claims by lay persons seeking payment of minimum wages, in amounts ascertainable with accounting accuracy, usually with little knowledge of their legal rights. Affirmance of the district court's decision here would not undermine the rationale in FLSA cases, where applicable to ADEA controversies.

Finally, in any event, if Runyan is to profit by his actions in the setting aside of the release he knowingly signed, he must be required to return the consideration received together with reasonable interest.

I, therefore, respectfully dissent.



APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RICHARD RUNYAN	:	Case No. C-3-80-202
	:	
Plaintiff	:	
	:	
vs.	:	
	:	
NCR CORPORATION	:	
	:	
Defendant	:	

DECISION AND ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; JUDGMENT TO BE ENTERED FOR DEFENDANT; TERMINATION ENTRY

- -

This matter is before the Court for a determination of Defendant NCR Corporation's (NCR) Motion for Summary Judgment (doc. #12). The present suit was filed pursuant to 28 U.S.C. § 1343[1] and 29 U.S.C. § 626(c)[2], the

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[1] 28 U.S.C. § 1343 provides in relevant part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

***

(4) To recover damages or to secure equitable or other relief under any Act of

(footnote continued)

civil enforcement provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. Plaintiff alleges that, prior to filing the instant action, he complied with the prerequisite required by 29 U.S.C. § 626(d)[3] of filing a charge of age

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(footnote continued from previous page)
Congress providing for the protection of civil rights, including the right to vote.

[2]29 U.S.C. § 626(c) provides in relevant part:

> (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, that the right of any person to bring such action shall terminate upon the commencement of an action by the Commission to enforce the right of such employee under this chapter.

[3]29 U.S.C. § 626(d) provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Commission. Such a charge shall be filed --
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within

(footnote continued)

discrimination with the Secretary of Labor[4] within 180 days of the alleged discriminatory conduct of the Defendant.

I. UNDISPUTED FACTS

The pleadings, affidavits and depositions filed in this matter reveal the following to be the undisputed facts relevant to a determination of Defendant's Motion for Summary Judgment:

(footnote continued from previous page)
30 days after receipt by the individual of notice of termination of proceedings under Sate law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

[4]Since the filing of this action, the administrative and enforcement functions relevant to this proceeding have been transferred from the Secretary of Labor to the Equal Employment Opportunity Commission pursuant to Section 1 of the 1978 Reorganization Plan No. 1, 43 F.R. 19087, 92 Stat. 3781. Thus, a charge of age discrimination in employment would now be filed with the EEOC.

A. Plaintiff, Richard Runyan, was born December 5, 1918, and, at age 53, was hired by James E. Rambo, Vice President and General Counsel at NCR, to work as an Assistant General Counsel in NCR's Corporate Legal Department. (Runyan Deposition pp. 4, 12, 21).

B. On or about the end of January or the beginning of February, 1977, Mr. Rambo informed Mr. Runyan that his employment with NCR would be terminated at the end of three months. (Runyan Deposition pp. 66-67; Rambo Deposition pp. 3 & 4) At that meeting, Mr. Runyan informed Mr. Rambo that he felt his "termination was related to age discrimination." (Runyan affidavit, Doc. #17, ¶ 9.)

C. Subsequent meetings took place between Mr. Runyan and Mr. Rambo, in which the terms under which Mr. Runyan would terminate

his employment with NCR were further discussed. (Runyan Deposition, pp. 67-71; Rambo Deposition, pp. 13-14)

D. As an outgrowth of these discussions, Mr. Runyan entered into a written Consulting Agreement with NCR which became effective on June 1, 1977, and was to terminate on May 31, 1978. The Agreement provided that, during the period designated therein, Mr. Runyan was to provide legal services on a consultant basis for which he was to be compensated at a rate of $150 per day, but subject to a minimum amount of compensation of $2,333 per month plus reimbursement for work related expenses. (Runyan Deposition, Defendant's Exhibit G, Consulting Agreement.)

E. In November of 1977, Mr. Runyan requested that the length of his Consulting Agreement be extended and that he be given increased compensation pursuant to the Agreement. (Runyan Affidavit, Doc. #17, ¶ 6)

F. At a subsequent meeting in November of 1977, Mr. Rambo informed Mr. Runyan that the term of his Agreement would not be extended but that his compensation would be increased to $4,000 per month from November 1, 1977, through May 31, 1978, in consideration for Mr. Runyan's executing a release of all claims he had or may have against NCR relating to his employment and/or his termination from employment. (Runyan Deposition, p. 81; Runyan Affidavit, Doc. #17, ¶ 6)

G. On November 25, 1977, Mr. Rambo and Mr. Runyan entered into a written amendment to the June 1, 1977, Consulting Agreement which provided that Mr. Runyan would receive $4,000 per month from November 1, 1977, to May 31, 1978. (Runyan Deposition, Defendant's Exhibit H)

H. Also on November 25, 1977, Mr. Runyan signed an "Accord and Satisfaction, Release, and Discharge" which provided that:

> "In consideration of the 'Amendment to the Consulting Agreement' executed by NCR. . .I, Richard V.

Runyan, hereby release and forever discharge NCR, its successors, assigns, transferees, officers, employees, representatives and agents from all manner of action and actions, cause and causes of action, suits, debts, contracts, controversies, agreements, promises, damages, judgments, awards, executions, claims and demands whatsoever in law or in equity which against NCR, I, Richard V. Runyan, ever had, now have, or which I hereafter can, shall, or may have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, save and except the aforementioned 'Amendment to Consulting Agreement' of November 25, 1977, and the underlying 'Consulting Agreement of June 1, 1977'.

I have read this release and understand all of its items. I execute it voluntarily and with full knowledge of its significance. Runyan Deposition, Defendant's Exhibit H)

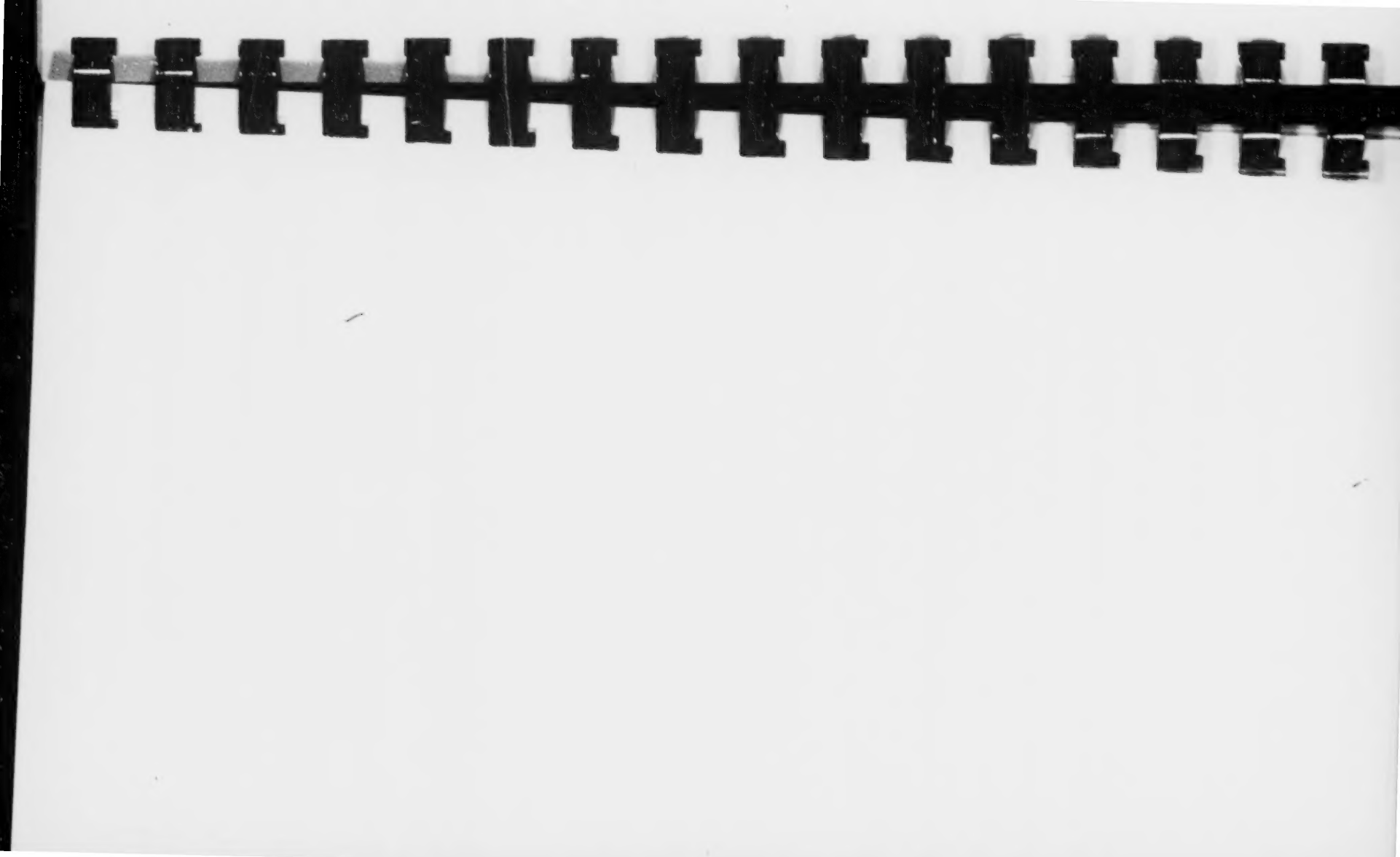
I. On May 31, 1978, the terms of the Consulting Agreement, as amended, expired and Mr. Runyan's working relationship with NCR terminated. (Runyan Affidavit, Doc. #17, ¶ 10)

J. On November 27, 1978, Mr. Runyan filed a charge of age discrimination with the Secretary of Labor concerning his termination at NCR. (Plaintiff's Complaint, ¶ 8)

K. On May 22, 1980, Plaintiff filed the instant proceeding alleging that he was terminated from NCR because of his age in violation of the provisions in the ADEA.

II. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

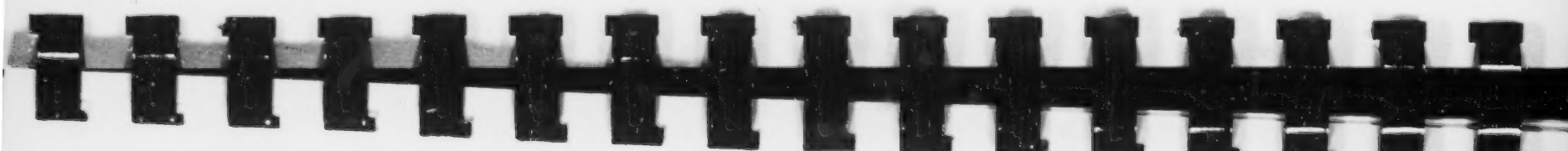
The basic thrust of Defendant's argument in support of its Motion for Summary Judgment is that Plaintiff is barred from bringing the present suit because he knowingly and voluntarily signed a release of all his claims against NCR, arising from his employment and/or termination of his employment with NCR, in consideration for the amendment to the Consulting Agreement which increased his compensation from $2,333 to 4,000 per month. Defendant contends that Plaintiff was an



experienced labor lawyer, who had, upon learning of his termination in February of 1977, indicated NCR's action might be related to age discrimination. When presented with the option of receiving increased compensation for the remainder of his Consulting Agreement in exchange for his signing the release, Plaintiff took the proposed amendment and the release home to read prior to signing both documents. The language of the release, Defendant contends, is clear and concise. That fact, coupled with the fact that Plaintiff is an experienced labor lawyer who had previously articulated his belief that the action of NCR might involve age discrimination, Defendant argues, establishes beyond question that Plaintiff voluntarily and knowingly released his alleged age discrimination claim against NCR. Thus, Defendant contends that it is entitled to

summary judgment, because there is no genuine issue of material fact as to whether Plaintiff is barred from bringing the instant action.

In opposition to Defendant's Motion for Summary Judgment, Plaintiff raises a number of arguments. First, Plaintiff contends that there is a genuine issue of material fact concerning the following issues: whether there was a bona fide dispute concerning a potential age discrimination charge when the release was executed; what was the intent and knowledge of the parties when the release was executed; the adequacy of the consideration; and "all the circumstances surrounding the execution of the release." (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 11) Plaintiff also asserts that as a matter of law, the release he executed does not bar the present action because there was no express waiver of his ADEA claim. He claims that an "unsupervised waiver" of his ADEA claim which he values at



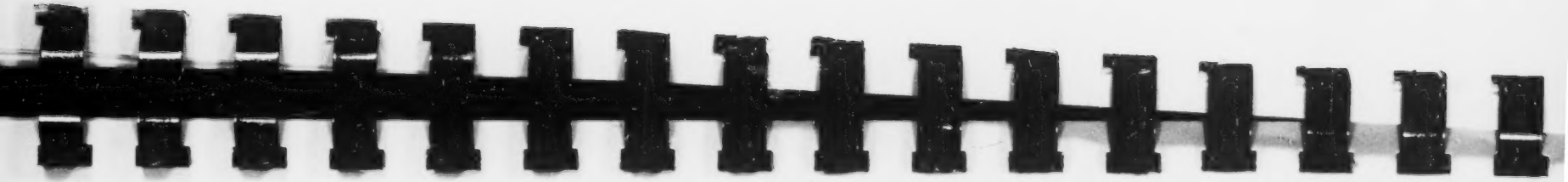
$450,000, in addition to the right to reinstatement, in exchange for the mere sum of $12,000, violates public policy and is void. Further, the Plaintiff contends that ADEA claims cannot be released prospectively and as the release was signed prior to his actual termination from NCR in May, 1978, the release cannot operate as a bar to this subsequent arising cause of action.

III. APPLICABLE LAW

In determining whether summary judgment is to be granted, the Court must first determine that there is no genuine issue of material fact. Fed. R. Civ. P. 56. "Thus on a motion for summary judgment, the movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." Smith v. Hudson, 600 F.2d 60, 63

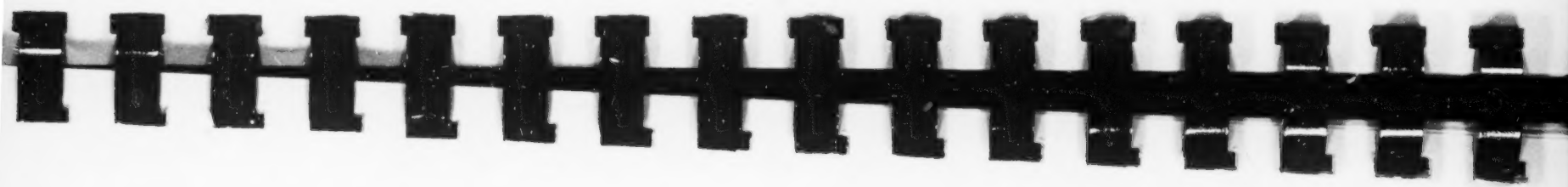
(6th Cir. 1979), cert. denied, 444 U.S. 986 (1979); citing, Adickes vs. Kress & Co., 398 U.S. 144, 157, 158-59 (1970); United States v. Diebold, 369 U.S. 654 (1962) (per curiam); United States v. Articles of Device, etc., 527 F.2d 1008, 1011 (6th Cir. 1976); see Ott v. Midland Ross Corp., 600 F.2d 24, at 28 & n 3. (6th Cir. 1979).

Moreover, because this matter involves the purported release of a federal statutory claim, this Court may interpret the release without regard to state law. City of Cleveland v. Cleveland Electric Illuminating Co., 538 F. Supp. 1287, 1289 (N.D. Ohio 1980); Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 889 (3rd Cir. 1975); Coester v. H.H.B. Co., 447 F. Supp. 372 (D.S. Da. 1978). The Court may, however, refer to and apply appropriate state law to the extent it is not inconsistent with federal common law. Id.



As with other claims of employment discrimination, a release of an ADEA claim knowingly and voluntarily entered into by an employee with his employer will be given effect absent vitiating circumstances surrounding its execution such as fraud, duress, lack of consideration, or mutual mistake of fact. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36 (1973); Pilon v. University of Minnesota, 710 F.2d 466, 467 (8th Cir. 1983); Strozier v. General Motors Corp., 635 F.2d 424, 426 (5th Cir. 1981); Odomes vs. Nucare, Inc., 653 F.2d 246, 253 (6th Cir. 1981); Ott v. Midland-Ross Corp., 600 F.2d 24 (6th Cir. 1979); Cox v. Allied Chemical, 538 F.2d 1094 (5th Cir. 1976); Garvin v. Postmaster, United States Postal Services, 553 F.Supp. 684 (E.D. Mo. 1982).

The question presented in this matter focuses on whether any of the arguments raised by Plaintiff are sufficient to override the plain language of the release he executed thus



enabling Plaintiff to litigate his claim against NCR for alleged age discrimination in terminating his employment.

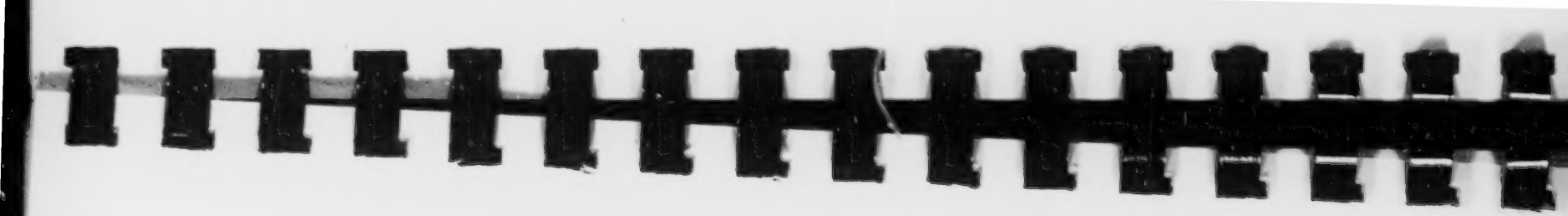
IV. DISCUSSION

Plaintiff contends that because he did not mention that he might have an ADEA claim against NCR in the November, 1977, meeting that resulted in the execution of the release, there was no bona fide dispute with respect to an age discrimination claim and thus the release cannot serve as a bar to this action.

Plaintiff does not elaborate on the significance of the necessity of there being a bona fide dispute. The Court notes, however, that a finding that there was a bona fide dispute has a potential bearing on two areas of concern that arise in evaluating the effect to be given an apparent release of a claim against an employer such as that presented herein.

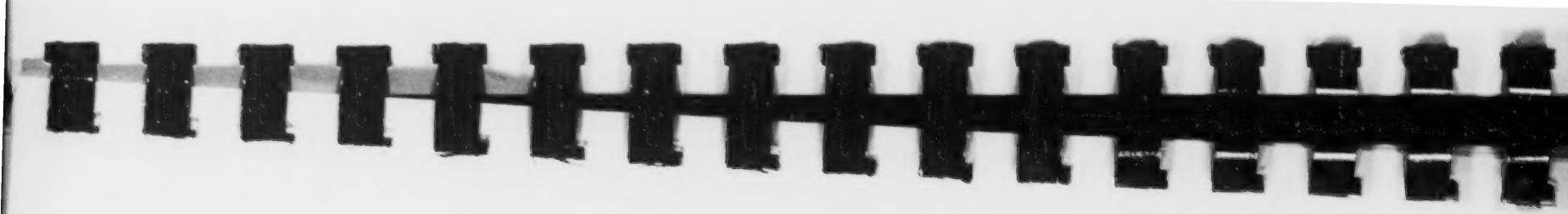
The first concern is whether the release is supported by adequate consideration. See Anderson v. Ciba Greigy Corp., 490 F.2d 438, 440-41 (8th Cir. 1974); Coester v. H.H.B. Co., 447 F. Supp. 372, 378 (D.S. Da. 1978). The second concern is whether the employee's release of his claim was knowing. See Alexander v. Gardner-Denver Co., 415 U.S. 360; Cox v. Allied Chemical Corp., 538 F.2d 1094; Garvin v. Postmaster, United States Postal Service, 553 F. Supp. 684.

Turning first to the Plaintiff's contention that there is a genuine issue of material fact concerning whether a bona fide dispute existed with respect to the reasons for terminating Plaintiff, the Court finds this argument contrary to the facts before it. In his deposition, Mr. Runyan indicated that from the beginning of his employment with NCR, he was aware that he was in the age bracket protected by the ADEA and that he believed he could thus only be terminated for cause.



(Runyan Deposition pp. 17-19). Plaintiff also stated in this deposition that he first suspected he was being discriminated against on the basis of age when he was told he would be terminated. (Runyan Depo. pp. 66-67; 78-79) Similarly, in Plaintiff's affidavit filed in opposition to Defendant's Motion for Summary Judgment, Plaintiff again admits that when he was first advised of his termination in February of 1977, it occurred to him that the termination was "related to age discrimination," and that he advised Mr. Rambo of his feelings. (Affidavit of Richard Runyan, doc. #17, ¶ 9); Affidavit of James E. Rambo, doc. #14, p. 4).

On the other hand, Mr. Rambo's affidavit states that Plaintiff's termination was prompted by Plaintiff's inadequate job performance and that he explained to Plaintiff the basis for his termination. (Rambo Affidavit, Doc. #14, pp. 304). Plaintiff does not dispute that he was told his termination



was related to his job performance; rather in his deposition, he indicated that he had had no prior indication that his performance was in any way a problem and that he concluded that the termination might in fact involve age discrimination.[5] (Runyan Depos. , pp. 65-69).

The evidence before the Court thus established that from the outset Plaintiff felt and made known to Defendant that he suspected his termination involved age discrimination Similarly, Mr. Rambo felt and made known to Plaintiff that it was Plaintiff's job performance that prompted his termination. There is nothing in the record that indicates that Plaintff's termination was not bona fide or that their differences were subsequently resolved. That Plaintiff did not reiterate his suspicions at the November

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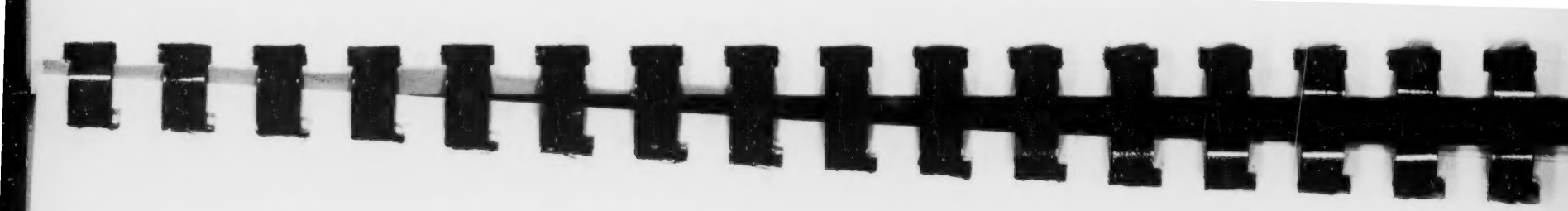
[5]Plaintiff also discussed in his deposition his belief that his termination might also involve reverse race discrimination Because the Plaintiff does not raise such an allegation in his complaint, the Court focuses its attention on those matters relating to his ADEA claim.

meeting when the release was executed, does not alter the conclusion that from the outset the parties did not agree on the true reasons behind Plaintiff's termination. The Court concludes, therefore, that there is no genuine issue of material fact as to the presence of bona fide dispute concerning Plaintiff's termination. Such a dispute, in fact, existed between the parties at the time.

Having determined that a bona fide dispute in fact existed between the parties, it follows that the release of Plaintiff's potential claims was supported by consideration.

When Plaintiff executed the release in exchange for the receipt of approximately $12,000 more than what he was entitled to receive under the original Consulting Agreement, Plaintiff received money to which he was not previously entitled and, ostensibly, in lieu of receiving the additional compensation relinquished his right



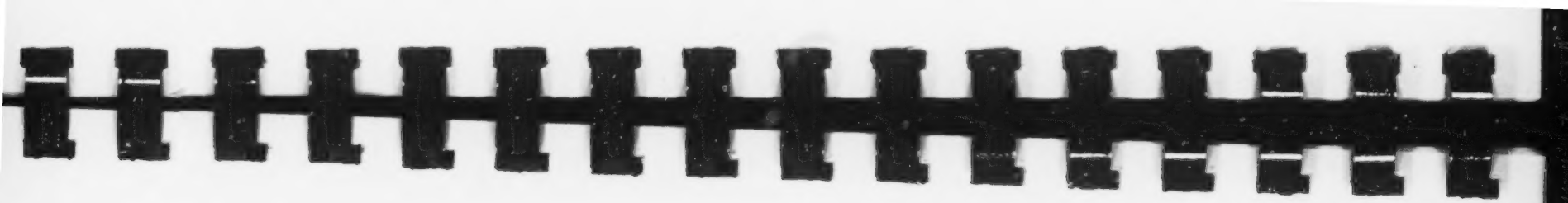
to pursue a legal remedy for what he felt to be his wrongful termination. Thus consideration flowed to both parties to the release.

Plaintiff, however, makes two arguments with respect to the consideration he received in return for executing the release, which he feels are persuasive in nullifying the effect of the release. On the one hand, he argues there is a factual question with respect to the "adequacy" of the consideration he received; that is, Plaintiff feels a jury might determine that he did not receive enough consideration in view of the claimed rights he relinquished Plaintiff also makes a legal argument that waiver of his ADEA claim and the potential relief available to him under the statute, in exchange for the paltry amount of $12,000, should be declared void as a violation of public policy.

Plaintiff makes two errors in his reasoning. First, Plaintiff misconstrues the meaning of the concept of adequacy of consideration. As discussed in Maynard v. Durham & S.R. Co., 365 U.S. 160, 163 (1961), adequacy of consideration goes to the question of whether there were mutual concessions, that is, in reference to the employee, whether he received something to which he did not already have an absolute right. The key factor in determining the validity of the release is not the amount of consideration the person giving the release receives, unless it is merely a token amount, but rather whether the person received something for which he was not previously entitled." Schmitt-Norton Ford, Inc. v. Ford Motor Co., 524 F.Supp. 1099, 1103 (D. Minn. 1981). Thus, the question of the adequacy of consideration turns not on whether a party received as much as he might have had he litigated the dispute and won, but, rather, whether he received something to which he was

not already unquestionably entitled. Plaintiff does not allege that he already had a legal right to the $12,000 increase in the Consulting Agreement, which he received in exchange for executing the release, nor can the Court conclude that $12,000 is a mere token amount. Thus, the Court finds that there is no genuine issue of material fact as to the adequacy of the consideration. The consideration is deemed to be adequate under the law.

With respect to the legal argument raised by Plaintiff, Plaintiff also errs in his interpretation of certain case law in arriving at the conclusion that a release of an ADEA claim cannot be given effect unless the employee received the substantial equivalent of what he would have received had he litigated the matter and succeeded on the merits. To be sure, the Supreme Court has held that an employee may not waive his right to wages and/or overtime compensation and the



statutorily prescribed amount of liquidated damages provided under the Fair Labor Standards Act[6] when there is no dispute as to the employer's liability under the Act or when the only dispute concerns whether the employer is covered by the Act. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); D. A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946). See also, Bingham v. Airport Limousine Service, 314 F. Supp. 565 (W. D. Ark. 1979). Similarly, it is well settled that the submission of an employment discrimination claim to arbitration will not bar an employee's subsequent suit in court unless he won in the arbitration

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[6]The Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq. prescribes, inter alia, a minimum wage and maximum hour limitations for covered employers. 29 U.S.C. § 216(b) provides that an employer who violates the minimum wage and maximum wage hour provisions of the FLSA contained in 29 U.S.C. §§ 206 and 207, is liable to the wrongful employee(s) for an amount of liquidated damages equal to the amount of wages or overtime compensation owing. Under the ADEA, the employer is only liable for an equal amount of liquidated damages if his ADEA violation was willful. 29 U.S.C. § 626(b).

proceeding and received the substantial equivalent of what he would have received had he pursued his statutory right in court. Alexander v. Garner-Denver Co., 415 U.S. 36 (1974); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975); cert. denied, 425 U.S. 944 (1976); Stozier v. General Motors Corp., 635 F.2d 424 (5th Cir. 1981).

But as explained by the Fifth Circuit in Allegheny-Ludlum, as well as in Stozier, nothing in the above stated propositions leads to the conclusion that an employee may not agree to release his disputed employment discrimination claim for less than he might conceivably be awarded were he to litigate his claim and win. Allegheny-Ludlum, 517 F.2d at 860-862; Stozier, 635 F.2d at 425-426; Garvin v. Postmaster, 553 F.Supp. at 687. Were such the case, there would be no motivation for employers to enter into settlement and release agreements concerning disputed employment

discrimination or, similarly, agreements concerning disputed FLSA claims as the employee would still be free to litigate his claim if he subsequently became disgruntled with the amount he received. Moreover, the employee would consequently be deprived of the opportunity to avoid unpredictable and potentially expensive litigation of his disputed FLSA or employment discrimination claim. Plaintiff does not cite, nor has the Court identified, any authority which holds that a plaintiff may not agree to release an employment discrimination claim, or for that matter, an FLSA claim, for less than what he might be entitled were he to litigate and win, given that a bona fide dispute exists as to the employer's liability.

Based upon the foregoing discussion, the Court concludes that there is no factual question concerning the adequacy of the consideration Plaintiff received for releasing his ADEA claim against Defendant. In

addition, the Court finds that the release does not violate public policy nor is its effect otherwise nullified because Plaintiff agreed to accept less than he might have been awarded had he litigated his claim and succeeded on the merits.

As stated above, a finding that a bona fide dispute existed between an employer and employee concerning an decision affecting the employee's status, also has some bearing on whether the employee's release of his potential claims was knowing.[7] Plaintiff's affidavit and deposition filed in this matter establish beyond question that he knew about the ADEA, that he knew he was within the protected age class and that he suspected his termination was related to age discrimination. Plaintiff however, argues that,

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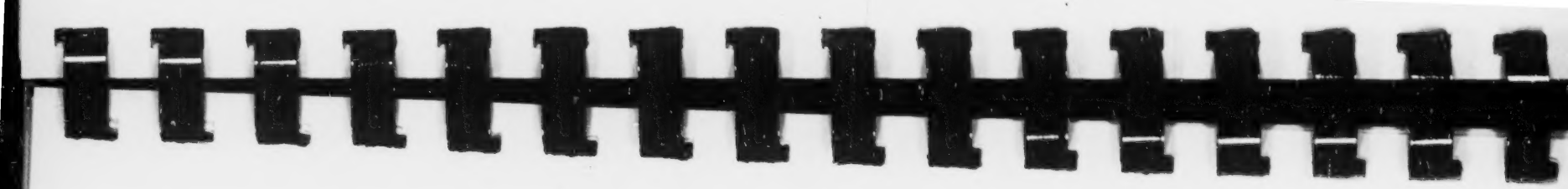
[7]The Court notes that a release of an employment discrimination charge must be both knowing and voluntary. Plaintiff does not however, argue that his signature on the release stemmed from duress or fraud or was in any way extracted against his will. The Court therefore only addresses whether the release was knowingly executed.

notwithstanding his awareness of such a potential ADEA claim, the Court should not give effect to the release because when he executed the release he did not think, or it was not his intent, that the release would or could serve as a release of his ADEA claim.

Arguably, as with other contracts, the intent of the parties executing a release is controlling. See City of Cleveland v. Cleveland Electric Illuminating Co., 538 F. Supp. 1287, 1289 (N.D. Ohio 1980), citing, Ruskay v. Waddell, 552 F.2d 392, 395-96 (2nd Cir.), cert. denied, 434 U.S. 911 (1977); American Commercial Lines, Inc. v. Valley Line Co., 529 F.2d 921, 925 (8th Cir. 1976); In re Independent Gasoline Antitrust Litigation, 79 F.R.D. 552, 559. 6 (D. Md. 1978); Grand Motors, Inc. v. Ford Motor Co., 564 F. Supp. 34, 42 (W.D. Mo. 1982). Though there are circumstances in which a court may look to facts and circumstances surrounding the execution of a release to determine the



parties' intent, where the question is the impact of the release on the parties executing it and "where the language of the release is unambiguous, its meaning is to be garnered from the instrument alone." Grand Motors, Inc. v. Ford, 564 F. Supp. at 42; Ingram Corp. v. J. Ray McDermott & Co., Inc., 698 F.2d 1295 (5th Cir. 1983); Coester v. H.H.B. Co., 447 F. Supp. at 378; Three Rivers Motors Co. v. Ford Co., 522 F.2d 885; ACF Produce, Inc. v. Chubb/Pacific Indem. Group, 451 F. Supp. 1095, 1101 (E.D. Pa. 1978).

In the present action, the Court finds the language of the release to be both clear and ambiguous By its own terms, Plaintiff waived any claims he might have against NCR arising out of his employment and/or his termination, from his employment That Plaintiff allegedly harbored the unspoken belief that he could not waive his ADEA claim simply conflicts with the express language of the release which waives all claims without

exception. Moreover, to the extent Plaintiff seeks to avoid the effect of the release, because he signed it with the mistaken belief he was not waiving his ADEA claim, it is well established that only a mutual mistake of a material fact can vitiate the effect of an otherwise valid release or settlement. See, Kress v. Long Island Railroad, 526 F. Supp. 856 (S.D.N.Y. 1981); Anderson v. Ciba-Geigy Corp., 490 F.2d at 442; Taylor v. Chesapeake & Ohio R. Co., 518 F.2d 536 (4th Cir. 1975); DeHart v. Richfield Oil Corp., 395 F.2d 345, 348 (9th Cir. 1968); Coester v. H.H.B. Co., 447 F. Supp. at 378. See also, Pilon v. University of Minnesota, 710 F.2d at 468. (Plaintiff's claim that she had been misinformed by her attorney as to the effect of release insufficient to avoid preclusive effect of otherwise valid release).

The Court concludes, therefore, that Plaintiff knowingly executed the release in this action and that his subjective,

unarticulated beliefs as to the effect of the release on his potential ADEA claim does not in any way serve to limit the scope of the release as executed.

Plaintiff argues that as a matter of law, the release that he executed cannot serve as a bar to the present action, because the release was not "expressly" conditioned upon a release of his ADEA rights. Plaintiff finds support for his contention from note 15 of Alexander v. Gardner-Davis, wherein the Supreme Court stated:

> In this case petitioner and respondent did not enter into a voluntary settlement expressly conditioned on a waiver of petitioner's cause of action under Title VII. In determining the effectiviness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing.

Alexander v. Gardner-Davis, 415 U.S. at 52, n. 15.

The Court does not read this note as requiring a release to state which specific employment discrimination claim or claims the employee is releasing or waiving. Arguably it must be clear that any settlement agreed upon is in exchange for the release of whatever claims the employee might have, but the courts that have addressed the issue of release in employment discrimination suits have focused on the two criteria articulated by the Supreme Court in the second sentence of note 15, i.e., that the release be voluntary and knowing. These courts have not read the note as also requiring the release to be worded in a particularly fashion. See e.g., Pilon v. University of Minnesota, 710 F.2d 466; Odomes v. NuCare, Inc., 653 F.2d 246; Cox v.Allied Chemical, 538 F.2d 1094.

The Court notes that there may well be situations that arise where the absence of an express relinquishment of a specific Title VII or ADEA claim, within a broadly worded

release, may tend towards establishing that the employee did not know he had such a claim or that the form he was signing was in fact a release. In such instances, though, the pivotal inquiry should be whether his release was knowing. Admittedly, the wording of the release may be one of the factors the court may examine to assess the employee's knowledge. Yet, if all of the circumstances surrounding the execution of a release indicate the employee knew he had a potential claim and voluntarily settled and released his claim, the employee should not be permitted to avoid the effect of a broadly worded release or waiver over what would, in such a situation, amount to a technicality in its wording. The release in the present case was specifically a release of any or all claims arising out of the Plaintiff's employment and/or termination of employment at NCR. A similarly worded release was given full effect by the court in Pilon v. University of

Minnesota, 710 at 467, and the Court is not persuaded that based upon the facts before it, the effects of the release should be vitiated because of the failure to state specifically that the release included Plaintiff's potential ADEA claim.

Plaintiff also seeks to avoid the effect of the release by arguing that when it was executed, in November of 1977, he did not at that time have an ADEA claim because he did not in fact terminate his employment at NCR until May, 1978. Plaintiff's argument asserts that he did not prospectively release his ADEA claim. This argument is without merit in view of the Supreme Court decision in Delaware State College v. Risks, 449 U.S. 250 (1980), wherein the Court held that with respect to the timely filing requirement under Title VII, the time begins to run at the date the employee is informed of his termination, not at the end of the period when he is finally released. The discriminatory conduct, if any,

is the decision to terminate, with the actual release merely serving as a result of the prior act of discrimination. Id. See also, Price v. Litton, 694 F.2d 963 (4th Cir. 1982); Mogley v. Chicago Title Ins. Co., 553 F. Supp. 1045, 1046 (E.D. Mo. 1983); Graves v. University of Michigan, Institute of Continuing Legal Education, 553 F. S. 532 (E.D. Mich. 1982). Thus, there simply is no question of prospective waiver in this case, as Plaintiff was informed of his termination in February of 1977, approximately nine months before he executed the release.[8]

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[8]The Court notes that despite Plaintiff's allegation to the contrary, Plaintiff did not file his charge of employment discrimination with the Secretary of Labor within 180 days of the act of discrimination as required by 29 U.S.C. § 626(d). Plaintiff was informed of his termination in February of 1977, yet he did not file his charge with the Secretary until November 27, 1978, well over 180 days after the alleged discriminatory conduct. Defendant has not argued that Plaintiff failed to timely perform this condition precedent to bringing the present suit. The timely filing requirement, however, does not go to the subject matter jurisdiction of this Court, but rather is in the nature of a statute of limitations. Thus, this defense is waivable

(footnote continued)

Finally, Plaintiff attempts to avoid the effect of the release by posing a broad public policy argument that in many respects touches upon issues the Court has already addressed. Plaintiff's argument asserts that an ADEA claim, allegedly valued in excess of $450,000, released without "supervision" in exchange for the meager sum of $12,000 is contrary to public policy and contravenes the statutory policy of the ADEA. The Court has already stated that it has been generally established that an employee may waive his right to bring a lawsuit to enforce his Title VII or ADEA claim and that such waiver has not been found violative of public or statutory policy but has, to the contrary, been found to be in accord with Congressional intent obtaining voluntary compliance with its employment

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(footnote continued from previous page)
and the Court may determine the merits of Defendant's motion despite Plaintiff's failure to timely file his charge with the Secretary. Reynolds v. Sheet Metal Workers, Local 107, 702 F.2d 221 (D.D. Cir. 1981).

discrimination laws. See, e.g., United States v. Allegheny Ludlum Industries, 517 F.2d 826; Stozier v. General Motors, 635 F.2d 424.

The Court has also discussed Plaintiff's contentions concerning the consideration he received for his release and found the consideration to be adequate and not in any manner contrary to public policy. What remains, then, of Plaintiff's public policy argument is the contention that, notwithstanding the willingness of courts to recognize and give effect to such releases, and notwithstanding the adequacy of the consideration he received, the fact that the execution of the release was "unsupervised" should nullify its effectiveness. Plaintiff attempts to draw support for this argument from 29 U.S.C. §216, the enforcement provisions for both FLSA and ADEA claims. Specifically, Plaintiff cites 29 U.S.C. § 216(c) which provides that the Secretary of Labor (now the EEOC with respect to ADEA

claims) "is authorized to supervise the payment of unpaid minimum wages or the overtime compensation owing to any employee" and that an employee who accepts full payment owing to him waives his right to sue for the damages that would be available to him were he to have filed a suit.

The Court does not read this provision as requiring the EEOC to supervise all ADEA releases. Rather, this subsection merely provides an alternative route through which an employee may recover the wages and compensation to which he is entitled. The employee may pursue an action on his own pursuant to subsection (b), or the EEOC, pursuant to subsection (c), may intervene and supervise the payment or sue to enforce the employee's right to wages and compensation.

Frequently, in Title VII and ADEA claims, the EEOC will be involved because of the requirement that an employee first file his complaint with the EEOC and allow the EEOC to

attempt to work out a conciliation agreement with the employer. See e.g., Cox v. Allied Chemical Corp., 538 F.2d 1094 (5th Cir. 1976); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976). The Court does not hold as a matter of law, however, that the execution of a release must be supervised by the EEOC. To be sure, there may well be circumstances wherein this Court would not give effect to a release because an employee lacking knowledge of his rights and potential remedies undertook on his own the negotiation and settlement of his claims against his employer. Such a case, however, is not presently before the Court. Plaintiff is an experienced labor lawyer who admittedly was aware of the ADEA, and presumably had the ability to research, discuss and resolve any questions or uncertainties he might have concerning the effect of the release he signed. Instead, Plaintiff, despite his purported uncertainties as to the effect of the release, chose to

accept the consideration offered to him, to execute the release and, apparently, to gamble on this Court's willingness to find the release void as to his ADEA claims. Based on the facts presented to it, the Court finds Plaintiff's argument to be untenable and rejects Plaintiff's contention that, as a matter of law, the release he executed should be nullified because it violates public and/or statutory policy.

In conclusion, the Court finds that there is no genuine issue of material fact concerning the execution of the release and that Plaintiff, as a matter of law, is bared from bringing the present action.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

WALTER H. RICE
UNITED STATES DISTRICT JUDGE

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